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No. 06-949

In The

Supreme Court of the United States

PETER F. CLOEREN,

Petitioner,

v.

ROBERT L. DRUSCHEL,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. "Relatedness" Between Forum Contacts And Cause Of Action In The Context Of Specific Personal Jurisdiction

When a cause of action arises out of or relates to the *sale* of a domestic corporation to a foreign corporation, are forum contacts that are solely related to the post acquisition *operation* of the domestic corporation sufficiently "related" to the cause of action, as a matter of due process, to support a Wisconsin court's assertion of specific *in personam* jurisdiction over a non-resident employee of the foreign corporation?

2. Fiduciary Shield Doctrine

When a non-resident's forum contacts occur entirely as a representative of his employer, may a Wisconsin court base its assertion of specific, *in personam* jurisdiction on only those contacts?

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OPINION AND ORDER AT ISSUE IN THIS CASE

Druschel v. Cloeren, 2006 WI App 190, 723 N.W.2d 430 (Ct. App. Aug. 1, 2006).

Druschel v. Cloeren, 2006 WI 126, 724 N.W.2d 205 (Oct. 10, 2006).

JURISDICTION OF THE UNITED STATES SUPREME COURT

a. Petitioner seeks review of a decision of the Wisconsin Court of Appeals dated August 1, 2006, where review was denied by the Wisconsin Supreme Court on October 10, 2006.

b. Jurisdiction is conferred by 28 U.S.C. § 1257(a), for an issue arising under the Fourteenth Amendment to the United States Constitution.

The judgment of the Wisconsin Court of Appeals sought to be reviewed was entered on August 1, 2006. A petition for review was filed with the Wisconsin Supreme Court and denied October 10, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Long-Arm Statute, Wis. Stat. § 801.05(1)(d):

> A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to section 801.11 under any of the following circumstances:
>
> (1) Local Presence or Status. In any action whether arising within or without this state, against a defendant who when the action is commenced:
>
> (a) Is a natural person present within this state when served; or
>
> (b) Is a natural person domiciled within this state; or
>
> (c) Is a domestic corporation or limited liability company; or
>
> (d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

STATEMENT OF THE CASE

Wisconsin resident Robert Druschel haled Peter Cloeren, a Texas resident, into a Wisconsin court to answer for an alleged breach of contract. Mr. Cloeren, however, has insufficient contacts with Wisconsin to subject him to the jurisdiction of a Wisconsin court.

The controversy in this case arose out of the late 1997 sale of Production Components, a Wisconsin corporation, to Cloeren, Inc., a Texas corporation.[1] Shortly before the September 1997 closing of the transaction, Mr. Druschel (a

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[1] (App. 57, R. 45 at 1.) At the time of the September 15, 1997 Stock Purchase Agreement, Cloeren, Inc. was known as The Cloeren Company. (App. 57, R. 45 at 1.) We will refer to it herein as the "Corporation." After the sale, Production Components/Chippewa Valley Die, Inc. was called Production Components – Cloeren, Inc. (App. 2; App. 57, 59, R. 45 at 2.) We will refer to it herein as simply "Production Components."

former shareholder of Production Components) insisted that Mr. Cloeren (a shareholder of the Corporation) sign the promissory notes in his personal capacity. Mr. Druschel subsequently breached his contractual obligations to Production Components, thereby giving rise to an offset against further payment of the purchase price, including the amount due under the promissory note signed by Mr. Cloeren. Mr. Cloeren stopped further payment, to which position Mr. Druschel took exception.

The Wisconsin Court of Appeals adopted an extraordinarily broad view of the Due Process Clause when it used contacts related only to the Corporation's post acquisition operation of the Wisconsin company to find personal jurisdiction over Mr. Cloeren. But Mr. Druschel's cause of action addresses, at its broadest, the *sale* of a Wisconsin corporation in 1997. Contacts related to the subsequent *operation* of the new company, therefore, cannot be said to "arise out of or relate to" the sale. Thus, Mr. Cloeren's contacts with Wisconsin (as an agent of the Corporation) resulting from operation of the company cannot serve as a basis for asserting specific jurisdiction in a case related to the sale of the company.

I. Factual Background.

A. Sale Of Production Components To The Corporation.

All shares of Production Components stock, including Mr. Druschel's shares, were sold to the Corporation on September 15, 1997. (App. 49-50, R. 30, Ex. 1; App. 58, R. 45 at 1.) As part of the payment of the purchase price, Mr. Druschel received a promissory note signed by Mr. Cloeren in his personal capacity. (App. 58, R. 45, Ex. 1.) Post closing adjustments to the purchase price led to Mr. Cloeren's execution of a replacement promissory note in favor of Mr. Druschel on February 26, 1998 (the "Replacement Note"). (App. 68, R. 45, Ex. 5.)

B. The Dispute.

Mr. Cloeren's refusal to pay the balance due under the Replacement Note was precipitated by Mr. Druschel's violation of his employment and non-compete agreements with the Corporation. (App. 48, R. 30, Ex. 1.) Mr. Druschel's breaches consisted of acting as an advisor in the formation and operation of a competing business and withholding information about an employee who solicited the company's customers on behalf of a competitor. (App. 78-97, R. 41, Ex. 7 at 114-116, 150, 159-160, 177-179; App. 53, R. 30, Ex. 1.) Mr. Druschel admits he breached his employment agreement by not notifying Production Components of these efforts to harm the company's business interests. (App. 82-84, R. 41, Ex. 7 at 150-51, 161.)

Both the Original Note and Replacement Note provide that, should Mr. Druschel breach his contractual obligations, Mr. Cloeren would be entitled to offset the resulting damages against any amounts remaining due under the notes. Mr. Cloeren exercised his offset right by refusing payment on the Replacement Note.

Mr. Cloeren filed suit in Texas to enforce his offset right. *See Cloeren, Inc. et al. v. Druschel*, Case No. B031037-C (Orange County, Texas, 163rd Judicial District Aug. 28, 2006) (the "Texas Case"). (App. 48, R. 30, Ex. 1.) Mr. Druschel responded by filing his suit in Wisconsin against Mr. Cloeren. The Texas Case remains open and stayed pending the resolution of the case at bar.

II. Mr. Cloeren's Insufficient Contacts.

There are two classes of activity relevant to the jurisdictional inquiry in this case: The first class – the sale of Production Components to the Corporation – gave rise to this cause of action. The second – the Corporation's post sale management of Production Components – has no relationship to the instant cause of action.

Because Mr. Cloeren lacked even minimal Wisconsin contacts with respect to the sale of the company, the trial and appellate courts imported contacts from the post sale

operation of the company to fill that deficit. Not only were those contacts not related to the cause of action, but they were not even contacts in Mr. Cloeren's personal capacity. Rather, his contacts with Wisconsin were in his capacity as a representative of the Corporation.

A. The Sale Of Production Components To The Corporation.

The Production Components shareholders sold their stock to the Corporation, not Mr. Cloeren. (App. 57, R. 45 at 1.) Mr. Cloeren was not the primary contact for the Corporation in those discussions, and he did not travel to Wisconsin to negotiate the terms. (App. 99-102, R. 20 at 99-104.) The deal in principal was reached without any substantive input from him. (App. 99-102, R. 20 at 99-104.)[2]

Mr. Cloeren then executed the transaction documents (on behalf of the Corporation) and the Original Note (in his personal capacity) in Texas. (App. 107-109, R. 16 at 110-111.) The Original Note specifies Texas law as governing, and shows Mr. Cloeren's address as Orange, Texas. (App. 64, 68, R. 45, Ex. 1, at 2, 4.) The Original Note is secured with shares of stock in a Texas corporation held in escrow by Orange Savings Bank. (App. 50, R. 30 at 2-3.)

The Replacement Note (upon which Mr. Druschel based his Complaint) took the place of the Original Note and, like the obligation it supplanted, designates Orange, Texas, as its site, identifies Texas law as governing, and shows Mr. Cloeren's address as Orange, Texas. (App. 71, 75, R. 45, Ex. 5 at 2, 4.)[3]

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[2] Mr. Cloeren, while not certain, believes it is possible he may have traveled to Wisconsin at one point for due diligence purposes. (App. 102-103, R. 20 at 104-105.)

[3] The Court of Appeals did not find general jurisdiction over Mr. Cloeren. Mr. Cloeren has resided in Texas for the last 25 years. (App. 111-112, R. 12, Interrogs. 1-2.) He does not have an ownership interest in any Wisconsin businesses, and he has no accounts in any Wisconsin financial institution. (App. 113-114, R. 12, Interrogs. 5, 9.)

B. Management Of Production Components After The Sale To The Corporation.

Because of the dearth of contacts between Mr. Cloeren and Wisconsin relating to the sale of Production Components, the trial and appellate courts looked to contacts related to a different transaction, to wit, the Corporation's post sale operation of Production Components. The courts borrowed the following contacts (all of which were accomplished in Mr. Cloeren's representative capacity) to fulfill the "minimum contacts" requirement: Mr. Cloeren visited Wisconsin six to eight times since 1997; spoke to one Wisconsin employee of Production Components approximately each week by telephone; spoke to another Wisconsin employee of Production Components approximately twice per month; and was involved in the management of a Texas corporation which owns a Wisconsin corporation (Production Components); and is actively involved in the management of Production Components. *See Druschel v. Cloeren*, 2006 WI App 190, 723 N.W.2d 430 (Ct. App. Aug. 1, 2006). (App. 1, 5.); *Druschel v. Cloeren*, Case No. 03CV359 (Wis. Cir. Ct. March 15, 2005.) (App. 25, 26.)

The Court of Appeals found these contacts should be considered regardless if they were made on behalf of a business. (App. 8.)

III. Procedural History.

Mr. Druschel filed his Complaint on September 17, 2003. (App. 41, R. 1 at 1.) Mr. Cloeren responded with a motion to dismiss for lack of personal jurisdiction. (App. 48, R. 30.)

Mr. Cloeren argued that he had insufficient contacts with the State of Wisconsin to warrant the exercise of either general or specific jurisdiction over his person. He also argued that any of his contacts with Wisconsin were strictly in a representative capacity, and did not constitute personal minimum contacts. The Circuit Court denied the

motion. *See Druschel v. Cloeren*, Order, Case No. 03CV359 (Wis. Cir. Ct. March 15, 2005) (App. 25.)[4]

Mr. Cloeren appealed the ruling on January 30, 2006, maintaining again that he lacked the requisite minimum contacts with the State of Wisconsin to support personal jurisdiction. The Court of Appeals affirmed on August 1, 2006, finding sufficient minimum contacts to support specific jurisdiction.

Both courts assessed only those contacts related to the operation of Production Components by the Corporation *after* the sale of the company. *See Druschel v. Cloeren*, 2006 WI App 190, 723 N.W.2d 430 (Ct. App. Aug. 1, 2006) (App. 1, 5, 25, 26); *Druschel v. Cloeren*, Case No. 03CV359 (Wis. Cir. Ct. March 15, 2005) (App. 25.) The Court of Appeals assumed, without analysis, that the cause of action related to, or arose out of, those contacts.

Mr. Cloeren timely brought his petition for review to the Wisconsin Supreme Court, asking the court to accept the case for the purpose of resolving, *inter alia*, the same two jurisdictional questions presented in the instant

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[4] At the hearing on the Motion to Dismiss, the Circuit Court found that post acquisition contacts were connected and related to the cause of action because "Cloeren failed to pay the balance on a promissory note payable to Mr. Druschel that was used to pay for stock held by Mr. Druschel in Production Components." (App. 33.) In doing so, the court espoused (*sotto voce*) a hybrid model of personal jurisdiction in which specific and general jurisdiction contacts are conflated in circumstances in which an analysis of the contacts under either of the standards independently would not confer jurisdiction. The Seventh Circuit has encountered this approach before: "[Plaintiff] argues, in effect, for a hybrid between specific and general jurisdiction where, though *all* of a defendant's forum contacts would not be relevant for minimum contacts, all of a defendant's contacts *with a specific plaintiff* would be." *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1278 (7th Cir. 1997) (emphasis in original). It also soundly condemned that approach: "We do not think, however, that using such a loose causal connection between a suit and a defendant's forum contacts as the basis for personal jurisdiction comports with fair play and substantial justice." *Id.* The court subsequently entered summary judgment against Mr. Cloeren on the merits of the case on August 29, 2005.

Petition. On October 10, 2006, that court denied the petition, making the published Court of Appeals opinion controlling law throughout the state.[5]

ARGUMENT

This petition presents a jurisdictional question identified, but not answered, by this Court in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984). This Court left open for future consideration how a court ought to determine whether a defendant's contact with a forum state is "related" to the pending cause of action for the purpose of establishing specific personal jurisdiction.[6]

The intervening years have spawned and nurtured a harmful and oft-commented upon division between the United States Courts of Appeals on how to answer that question. It is a conflict that, as one court stated as recently as 2004, "has plagued federal Courts of Appeals and has resulted in divergent rules." *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 99 (3d Cir. 2004).[7]

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[5] App. 39; The Wisconsin Court of Appeals published its opinion in this case on October 10, 2006. Review by the Wisconsin Supreme Court is discretionary. Wis. Stat. § 809.62(1) (2003-04).

[6] Review is, of course, a matter of judicial discretion on a writ of certiorari before this Court. With respect to both of the questions we present in this Petition, we believe the following considerations are applicable: "(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," and "(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court." Sup. Ct. R. 10. Although the Wisconsin Court of Appeals is not this State's court of last resort, the Wisconsin Supreme Court's denial of the petition for review means the appellate opinion has the same state-wide precedential effect as a supreme court opinion.

[7] Commentators also have taken note of the continuing division and the difficulties it presents. *See, e.g.*, Linda Sandstrom Simard, *Meeting Expectations: Two Profiles For Specific Jurisdiction*, 38 IND. L. REV. 343, 348 (2005) ("Notwithstanding the Court's lack of direction –

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The Due Process Clause cannot serve its purpose in such a turbulent and uncertain milieu. That clause is supposed to give the average American the ability to intelligently order his affairs so that he may know where he is subject to a foreign state's jurisdiction. "The Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

It is currently almost impossible to discern when one's activities will give rise to "specific" personal jurisdiction. Indeed, as discussed below, highly-experienced federal court judges cannot agree on what activities suffice for the exercise of such jurisdiction. In fact, they cannot even agree on what test to apply in making that determination. That leaves little hope for the layman as he attempts to foresee the jurisdictional consequences of his activities.

Foreseeability is the Due Process touchstone for a court's exercise of personal jurisdiction over a non-resident. That foreseeability has vanished, however, as state and federal courts developed, over the last few decades, widely disparate tests to determine when courts may exercise specific *in personam* jurisdiction. The crux of the division lies in how to determine the "relatedness" between the defendant's forum activities and the cause of action. The approaches vary greatly, ranging from a Rube Goldberg-like "but for" test, to a vague "substantial relationship" test, to a more limited and rational "proximate cause" analysis.

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or possibly because of it – lower courts and commentators have struggled to give meaning to the nexus requirement."). The current jurisdictional picture has variously been described as "unsatisfactory," a "mess," "incoherent," and "in chaos." Charles W. Rhodes, *The Predictability Principle In Personal Jurisdiction Doctrine: A Case Study On The Effects Of A "Generally" Too Broad, But "Specifically" Too Narrow Approach To Minimum Contacts*, 57 BAYLOR L. REV. 135, 139 (Winter 2005).

The practical result is that no one can be certain which, or how many, of his or her activities will confer personal jurisdiction on a foreign state. The Court should grant this petition to restore foreseeability to the application of the Due Process Clause.

This Petition also presents an apt occasion for the Court to address a closely related jurisdictional question, to wit, whether a court may exercise *in personam* jurisdiction over an individual whose only relevant contacts with a forum state are acts in a representative capacity on behalf of a corporate entity. This question is of vital importance both as a matter of federal constitutional law, and as a matter of pragmatism to the increasing number of people whose everyday business is corporate and interstate.

Because this question has not been settled by the Court, and because the lower courts are applying the due process clause in an inconsistent manner, people are left with greater or lesser constitutional protections in and among the several States. This Court should resolve the issue and end the split.

I. The "Minimum Contacts" Question The Wisconsin Court Decided Has Not Been, But Should Be, Settled By This Court.

As this Court well knows, a court may not exercise personal jurisdiction over a non-resident unless that person has "minimum contacts" with the forum state, and the exercise of jurisdiction on the basis of those contacts would be consistent with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-77 (1985); *Helicopteros*, 466 U.S. at 414; *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).[8]

[8] Wisconsin's long-arm statute (Wis. Stat. §801.05) reaches to the full extent allowed by the Due Process Clause. *See Allen-Bradley Co., Inc. v. Datalink Techs., Inc.*, 55 F. Supp. 2d 958, 959 (E.D. Wis. 1999). The specific provision invoked by the Chippewa County Circuit Court

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In the context of the assertion of "specific" personal jurisdiction, the prospective defendant's contacts with the forum must evidence that (1) "the defendant has 'purposefully directed' his activities at residents of the forum," and (2) "the litigation results from the alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)); *Helicopteros*, 466 U.S. at 414.

A. This Court Specifically Left Unanswered The Question Presented By This Petition.

In *Helicopteros*, this Court expressly left the meaning of the second prong of the "specific" jurisdiction analysis for future consideration:

> [W]e decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) *what sort of a tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists.*

Helicopteros, 466 U.S. at 416 (emphasis supplied). This petition describes the need to resolve the second of those two questions, that is, how "related" a defendant's contacts must be to the plaintiff's cause of action.

The question of "relatedness" serves two essential purposes: "First, relatedness is the divining rod that separates specific jurisdiction cases from general jurisdiction cases. Second, it ensures that the element of causation remains in the forefront of the due process investigation." *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 714 (1st Cir. 1996).

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states that: "A court of this state having jurisdiction of the subject matter has jurisdiction over a person [who] . . . [i]s engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise." Wis. Stat. §801.05(1)(d).

Lacking direction from this Court on the "relatedness" question, however, the United States Circuit Courts of Appeals have adopted a potpourri of conflicting standards, some of which serve the purposes identified by *Nowak*, some of which do not.

The differing standards are outcome determinative inasmuch as *in personam* jurisdiction may or may not exist depending upon which test the court adopts. As a result, not only does the Constitution provide differing levels of due process protection depending on a plaintiff's choice of forum, but non-residents have no way of discerning which of their actions may subject them to a foreign state's jurisdiction.

B. The United States Circuit Courts Of Appeals Are In Disarray.

The split between the United States Circuit Courts of Appeals on how to answer the "relatedness" question was already sufficiently well-developed in 1996 that the *Nowak* court could catalogue the division. The split has shown no sign of resolving since that decision. In fact, it is a division still "plaguing" the courts. *See Miller Yacht Sales, Inc.*, 384 F.3d at 99 (a 2004 case noting the division before succumbing to the plague by abandoning the effort to develop a consistent analysis).

The *Nowak* court found the Circuits generally fall into one of two basic camps. The first applies a "proximate cause" analysis, while the second employs a "but-for" test in assessing whether a defendant's activities in the forum were sufficiently related to the asserted cause of action. It also noted the existence of a nautical-themed "in the wake of" standard, and a "substantial connection" test.

1. Three Circuits Use A "Proximate Cause" Test To Analyze Due Process.

The leading proponent of the "proximate cause" approach to assessing relatedness is the United States Circuit Courts of Appeals for the First Circuit. Other

Circuits using this analytical framework include the Second and Eighth. District Courts in the Third and Tenth Circuit have also appeared favorably inclined to this standard.[9]

The *Nowak* court observed that "relatedness is the divining rod that separates specific jurisdiction cases from general jurisdiction cases[, and it] . . . ensures that the element of causation remains in the forefront of the due process investigation. Most courts share this emphasis on causation, but differ over the proper causative threshold." *Nowak*, 94 F.3d at 714 (internal marks and citation omitted).

The "proximate cause" standard forswears specific personal jurisdiction unless it "is premised on a contact that is a legal cause of the injury underlying the controversy – *i.e.*, that form[s] an important, or [at least] material, element of proof in the plaintiff's case. . . . " *Nowak*, 94 F.3d at 715 (internal marks and citation omitted, modifications in original). Application of this concept in the jurisdictional inquiry, however, is not as rigid as when employed in the tort context. "[W]e intend to emphasize the importance of proximate causation, but to allow a slight loosening of that standard when circumstances dictate. We think such flexibility is necessary in the jurisdictional inquiry: relatedness cannot merely be

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[9] *Wims v. Beach Terrace Motor Inn, Inc.*, 759 F. Supp. 264, 267, 268 (E.D. Pa. 1991) (In case involving personal injury claim in new Jersey from defendant's negligence, court states, "[w]hile it is true that [plaintiff] might not have visited the motor inn if [she] had not seen the defendant's brochure, the causal link between the brochures and the injury is simply too attenuated to say that the injury arose from Pennsylvania."); *Dirks v. Carnival Cruise Lines*, 642 F. Supp. 971, 975 (D. Kan. 1986) (Although court references but-for analysis, it concludes that "[p]laintiff's cause of action is based on Carnival's duty to exercise due care to its passengers. Such a duty was not owed plaintiff until she became a passenger upon the ship in California. Consequently, Carnival's duty to plaintiff did not originate from its activities in Kansas. Plaintiff's injury was the ending in a fortuitous course of events that began with defendant's advertising of cruises and its selling of tickets.").

reduced to one tort concept for all circumstances." *Nowak*, 94 F.3d at 715.

The First Circuit favors the "proximate cause" approach because of the emphasis on foreseeability. "[P]roximate or legal cause clearly distinguishes between foreseeable and unforeseeable risks of harm. Foreseeability is a critical component in the due process inquiry, particularly in evaluating purposeful availment, and we think it also informs the relatedness prong." *Nowak*, 94 F.3d at 715 (citation omitted).

The emphasis on foreseeability, the *Nowak* court observed, flows directly from this Court's teaching on Due Process Clause fundamentals:

> [The Due process Clause] requir[es] that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign. . . ." [T]his "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *and* the litigation results from alleged injuries that "arise out of or relate to" those activities.

Nowak, 94 F.3d at 715 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. at 472) (modifications in original, emphasis supplied).

The Eighth Circuit, while not specifically labeling its test "proximate cause," agrees with the content of the First Circuit's analysis: "[T]he defendant's in-state conduct must form an 'important, or [at least] material, element of proof' in the plaintiff's case." *United Elec., Radio and Mach. Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992).[10] The court went on to

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[10] The *163 Pleasant Street* court recognized the division between the Circuit Courts and responded by developing what it called "a few, rather abecedarian precepts pertaining to the relatedness requirement." *163 Pleasant Street Corp.*, 960 F.2d at 1089. Surely a Circuit Court's confessed resort to "abecedarian" principles in answering such a fundamental constitutional question is, if nothing else, an invitation for this Court's

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explain the relationship between its test and the tort-based standard of causation:

> We have likewise suggested an analogy between the relatedness requirement and the binary concept of causation in tort law under which both elements – cause in fact (i.e., the injury would not have occurred "but for" the defendant's forum-state activity) and legal cause (i.e., the defendant's in-state conduct gave birth to the cause of action) – must be satisfied to find causation sufficient to support specific jurisdiction. In this inquiry, foreseeability is critical.

Id.

The Second Circuit agrees that, at least when contacts are few, those contacts must have proximately caused the injury of which the plaintiff complains. In *Chew v. Dietrich*, 143 F.3d 24 (2nd Cir. 1998), the court said:

> Where the defendant has had only limited contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts. . . . Where the defendant's contacts with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury.

Id. at 29.

The test a court adopts to answer the "relatedness" question is tremendously important because it can be dispositive of jurisdiction. For instance, had the Wisconsin Court of Appeals applied the proximate cause test in this case, it would have stayed its hand. No court or party has ever asserted (or even suggested) that the contacts upon

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attention. Especially when those precepts conflict with ones developed by other Circuit Courts of Appeals.

which the courts relied were proximately related to Mr. Druschel's cause of action. A more liberal standard, however, such as the "but-for" test, sweeps considerably more broadly, subjecting people to the jurisdiction of foreign states based on only tenuous contacts.

2. Two Circuits Use A "But-For" Test To Analyze Due Process.

The Ninth Circuit carries the banner for the "but-for" test. In *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995), the court unabashedly expressed this standard: "We rely on a 'but for' test to determine whether a particular claim arises out of forum-related activities and thereby satisfies the second requirement for specific jurisdiction." *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995).[11]

The Ninth Circuit has explicitly recognized the outcome-determinative effect of which "relatedness" test a court adopts. In the *Shute* case, the court used the "but-for" test in approving jurisdiction over the non-resident Carnival Cruise Lines for a slip-and-fall accident occurring in international waters. The court observed:

> Were this court to apply the "arising from" analysis of *Marino* and *Pearrow* to this case, we would conclude that Mrs. Shute's fall did not arise out of Carnival's solicitation of business in Washington. Rather, we would find that her injuries arose out of the negligent failure to maintain a safe passageway through the galley of the TROPICALE.

Shute, 897 F.2d at 383. The *Marino*[12] case to which the court referred is a First Circuit decision employing the

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[11] The *Ballard* court concluded, correctly we believe, that the Ninth Circuit's employment of the "but-for" test was not disturbed by this Court's reversal of *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), in which the Ninth Circuit originally adopted this standard. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

[12] *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986). The *Marino* court construed the Massachusetts long-arm statute. The Massachusetts

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"proximate cause" test described above. The *Pearrow*[13] decision (an Eighth Circuit case), adopted the substance of the "proximate cause" test, although it was not labeled as such.

The Fifth Circuit is in the "but-for" camp, although it has wavered. In *Prejean v. Sontrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981), the court claimed the "but-for" mantle in no uncertain terms: "Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a 'but for' causative factor for the tort since it brought the parties within tortious 'striking distance' of each other." *Id.* at 1270 n.21.[14] A few years later, the Circuit edged away from its commitment to that test. *See, e.g., Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986) ("[T]his court has observed that merely contracting with a resident of a forum state is insufficient to subject the nonresident to the forum's jurisdiction," and although "the contractual relationship between [defendant and plaintiff] may have been cemented in Texas, the significance of this fact is diminished by the contract provision specifying that Oklahoma law would govern the agreement"). It appears to have now returned to the fold. *See, e.g., Trinity Indus., Inc. v. Myers & Assoc., Ltd.*, 41 F.3d 229, 231-32 (5th Cir. 1995) ("There would be no injury or basis for a claim but for the fact that [defendant] represented [plaintiff] in Texas").

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high court subsequently rejected the "proximate cause" test in favor of the "but-for" standard in evaluating relatedness for purposes of the statutory analysis. *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 771-74 (1995). However, the First Circuit recognized that this has no impact on the constitutional analysis. *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 207 n.8 (1st Cir. 1994).

[13] *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983).

[14] *Prejean* involved the assertion of widows' tort claims against their late husbands' Algerian employer (and others) arising out of a fatal airplane accident. *Prejean*, 652 F.2d at 1264.

The *Nowak* court identified the principle weakness in the far-reaching effect of this standard: "A 'but for' requirement . . . has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain." *Nowak*, 94 F.3d at 715. Far better, *Nowak* said, is the "proximate cause" analysis, which "is likely to enable defendants better to anticipate which conduct might subject them to a state's jurisdiction than a more tenuous link in the chain of causation." *Id.*

3. One Circuit Uses An "In The Wake Of" Test To Analyze Due Process.

The Seventh Circuit's approach does not fit neatly into either of the two primary categories of "relatedness" tests. In substance, however, it lies closest to the First Circuit's "proximate cause" standard.

In *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272 (7th Cir. 1997), the court described its test in distinctly First Circuit-like terms: "To be relevant for personal jurisdiction, however, past contacts involving the forum state should either bear on the substantive legal dispute between the parties or inform the court regarding the economic substance of the contract." *Id.* at 1278.[15] Indeed, the court turned to a First Circuit case to find support for a robust connection between the contacts and the cause of action. "As the First Circuit put it, specific jurisdiction is not appropriate "merely because a plaintiff's cause of

[15] The plaintiff in *RAR, Inc.* advanced a personal jurisdiction argument that appears identical to the Wisconsin Court of Appeals' decision in this case. The *RAR, Inc.* court observed that the plaintiff "argues, in effect, for a hybrid between specific and general jurisdiction where, though *all* of a defendant's forum contacts would not be relevant for minimum contacts, all of a defendant's contacts *with a specific plaintiff* would be." *RAR*, 107 F.3d at 1278 (emphasis in original). The court soundly rejected that approach: "We do not think, however, that using such a loose causal connection between a suit and a defendant's forum contacts as the basis for personal jurisdiction comports with fair play and substantial justice." *Id.*

action arose out of the general relationship between the parties; rather, the action must *directly arise* out of the specific contacts between the defendant and the forum state." *Id.* (citing *Sawtelle v. Farrell*, 70 F.3d 1381, 1389 (1st Cir. 1995)) (emphasis in original).

The Seventh Circuit, however, has suggested that something less than proximate cause will suffice for the exercise of specific personal jurisdiction. In assessing the Illinois long-arm statute, the court said that "[t]he [statute's] 'arising from' requirement is liberally construed – all one need be able to say is that the cause of action lies somehow 'in the wake' of the Illinois transaction." *Heil v. Morrison Knudsen Corp.*, 863 F.2d 546, 549 (7th Cir. 1988). The court was quick to note, however, that "this is not to be taken literally . . . It is not to be supposed that every time a board of directors meets, it makes waves in whose wakes causes of action float. . . ." *Id.*

The *Heil* court found that Illinois' long-arm statute did not reach the accused activity, and so there was no cause to apply the "in the wake of" standard to the Due Process Clause. But a few years previously, in *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215-16 (7th Cir. 1984), the court used the same nautical metaphor in justifying the exercise of personal jurisdiction: "The discussions that took place in Illinois between [defendants] played a part in the subsequent negotiations between [defendant] and plaintiff, which led to the contract. . . . The contract under which the plaintiff is suing for breach of warranty thus lies in the wake of [defendant's] commercial activities in Illinois." *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215-16 (7th Cir. 1984). It thus appears that the Seventh Circuit, while holding to some form of "proximate causation," uses the "in the wake of" metaphor to liberalize the test to some (uncertain) extent.

4. One Circuit Uses A "Substantial Connection" Test.

The Sixth Circuit rejects the proximate cause standard, but does not go as far as the "but-for" test endorsed

by the Ninth Circuit. It says that the "arising from" criterion "does not require that the cause of action formally 'arise from' defendant's contacts with the forum; rather, this criterion requires only 'that the cause of action, of whatever type, *have a substantial connection with* the defendant's in-state activities.'" *Third Natl. Bank in Nashville v. Wedge Group Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989) (emphasis in original).

The Sixth Circuit apparently sees this as a fusion between the "but-for" and "in the wake of" approaches. In *Lanier v. American Bd. of Endodontics*, 843 F.2d 901 (6th Cir. 1988), the court considered a sex discrimination case involving the American Board of Endodontics' refusal to certify a Michigan dentist. After reviewing the Seventh Circuit's "in the wake of" test, it stated: "Clearly the cause of action herein, if one exists, arose from, was 'made possible' by, and lies in the 'wake' of the application process, much of which occurred in Michigan." *Id.* at 909.

It is possible to view this test (and, perhaps, the Seventh Circuit's test) as lying somewhere between the First Circuit's "proximate cause" standard and the Ninth Circuit's "but-for" inquiry. In the Due Process context, however, a middling approach has little merit when all it accomplishes is to further obscure what activity may subject a person to a foreign state's jurisdiction.

5. One Circuit Refuses To Adopt Any "Relatedness" Test.

The Third Circuit, at one point, hewed to an approach similar to the "proximate cause" test, but ultimately resigned the effort at constructing any particular analytical scaffold. It instead resorted to an unhelpful ad hoc determination of relatedness that contains no predictive value whatsoever.

In *Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Prods. Co.*, 75 F.3d 147 (3d Cir. 1996), the court considered whether the parties' contractual relationship in the 1980s (long since terminated by the time of the dispute) should count towards the necessary minimum

contacts to support jurisdiction in a case addressing an entirely separate contract executed some years later. Leaning on this Court's teaching in *Burger King*, the court said the relevant contacts are those relating to "dealings *between the parties in regard to the disputed contract,* not dealings unrelated to the cause of action." *Id.* at 153 (emphasis in original). The court found no specific personal jurisdiction.

To the extent the *Vetrotex* court adopted the proximate cause test, the Third Circuit expressly jettisoned it in *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93 (3d Cir. 2004). The court said "we do not agree that we must apply an immediate or proximate cause standard to determine whether a claim arises out of a defendant's contacts with a forum state. . . ." *Id.* at 98.

In abjuring the proximate cause test, the court took note of the void it left behind: "We recognize that our conclusion that a defendant's contacts with a forum need not have been the proximate cause of the plaintiff's injuries in a tort case begs the question of what level of relationship is necessary under the 'arise out of or relate to' requirement." *Id.* at 99-100. Its response to that vacuum was (and is) both unsettling and destructive of the core purpose of the Due Process Clause.

The *Miller Yacht Sales* court denied it had any responsibility to construct (or borrow) an analytical framework within which to decide the "relatedness" question, which it acknowledged "has plagued federal Courts of Appeals and has resulted in divergent rules." *Id.* at 100. Instead, it said: "We have not laid down a specific rule because we have approached each case individually and taken a "realistic approach" to analyzing a defendant's contacts with a forum." *Id.* at 100.

It is anyone's guess what result an ad-hoc "realistic" approach will yield in any given case. That is, after all, the point of rejecting a discernible standard. But one thing is certain – it provides no means by which a non-resident can determine whether his or her activities will give rise to

specific personal jurisdiction in the Third Circuit. This is truly justice by the measure of the chancellor's foot.

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In the context of specific *in personam* jurisdiction, the Due Process Clause no longer performs the salutary function envisioned by this Court. The sometimes vague, sometimes limitless, but ever-conflicting rules by which courts determine relatedness have defeated "the 'orderly administration of the laws. . . .'" *World-Wide Volkswagen Corp.*, 444 U.S. at 297. And the Clause no longer "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.*

The situation is intolerable and growing more so. The current disagreement amongst the United States Courts of Appeals is a sufficient reason for this Court to address this open question. The Third Circuit's recent surrender to ad hoc rulings, eschewing any guiding analytical framework, suggests the Circuit Courts are reaching a point of exasperation that augurs ill for those over whom they exercise their jurisdiction. While the Third Circuit most starkly illustrates the problem with leaving this question open, the welter of "relatedness" tests amongst the Circuits is no less corrosive of Due Process Clause protections. The Court should grant this Petition and answer the question it identified in *Helicopteros*.

II. The Fiduciary Shield Question The Wisconsin Court Decided Has Not Been, But Should Be, Resolved By This Court.

Under the fiduciary shield doctrine, "an individual's transaction of business within the state solely as a corporate officer does not create personal jurisdiction." *Stuart v. Spademan*, 772 F.2d 1185, 1197-98 (5th Cir. 1985). Until the decision in this case, Wisconsin's courts had neither rejected nor accepted the doctrine, but the Seventh Circuit has treated the matter as one of state law rather than federal due process. *See Hardin Roller Corp. v. Universal*

Printing Machinery, 236 F.3d 839, 842 (7th Cir. 2001) ("Never in that state's history have its courts applied the doctrine – but neither have they definitively rejected the possibility.").

In this case, the lower courts refused to apply the doctrine, holding that state law alone applied to the issue of whether Mr. Cloeren was amenable to personal jurisdiction for actions taken purely in a representative capacity. *See Druschel v. Cloeren*, 2006 WI App 190, 723 N.W.2d 430 (Ct. App. Aug. 1, 2006) (App. 8.); *Druschel v. Cloeren*, Case No. 03CV359 (Wis. Cir. Ct. March 15, 2005.) (App. 25, 31.)

A. The Petition Presents A Ripe Occasion For The Court To Address The Questions Of Due Process Left Open In *Hustler Magazine*, *Calder*, *Burger King*, And *Helicopteros*.

In two companion cases issued more than twenty years ago, this Court touched briefly upon the issue of whether the due process clause permits the exercise of personal jurisdiction over a corporate representative acting, at least in part, in a representative capacity. *Keeton v. Hustler Magazine*, 465 U.S. 770, 781 n.13 (1985); *Calder v. Jones*, 465 U.S. 783, 790 (1985). The Court had no need to dwell on the issue because the defendant in each of those cases had individual, as well as representative, contacts with the forum at issue.

Post-*Hustler* and *Calder*, the issue has brewed in the courts below, and has been most problematic where a defendant's contacts are *entirely* representative in nature. Because neither *Hustler Magazine* nor *Calder* dealt with the scenario where the contacts are entirely representative, the lower courts have split in analyzing the issue.

Some courts view representative contacts as part and parcel of a federal due process analysis, and ask whether basing personal jurisdiction upon contacts made in a representative capacity comports with traditional notions of fair play and substantial justice. These courts apply the fiduciary shield doctrine, and find that the due process clause would be offended if contacts made in a representative capacity alone were sufficient to establish jurisdiction

over the person as an individual. Other courts, however, outright reject the notion that contacts in a representative capacity should be viewed any differently – for due process purposes – than contacts made by an individual personally. Still other courts consider representative contacts to be a matter of equity under state law, and therefore do not evaluate the issue under the Due Process Clause at all.

B. The Court Should Further Define The Circumstances Under Which An Employee Acting In A Representative Capacity May Reasonably Expect To Be Haled Into Court On An Individual Basis.

In assessing the fiduciary shield doctrine, courts have relied on a brace of this Court's opinions issued more than twenty years ago. *See Hustler Magazine*, 465 U.S. 770 and *Calder*, 465 U.S. 783. *Calder* involved journalists writing for the National Enquirer Magazine, and *Hustler Magazine*, it could go without saying, involved another publication of questionable repute.

In *Calder*, the Court's analysis turned upon the ultimate inquiry in any personal jurisdiction case: whether the defendant personally, reasonably should have anticipated being haled into court in the forum state. 465 U.S. at 789-90. The defendants in *Calder* – who wrote for the *National Enquirer* – published an allegedly defamatory article on California actress Shirley Jones. *Id.* at 784. When Ms. Jones sued them in a California court, the journalists claimed that the court lacked jurisdiction over their persons since they were merely acting for the paper, and not in their individual capacities. *Id.* at 789.

The Court rejected this defense as a factual matter, not as a matter of law. The Court noted that the reporters' personal "byline" appeared on the published article, *id.* at 785, and thus the "journalistic" piece at issue possessed a personal character.

With regard to their status as employees, the Court noted only that it did not "somehow insulate them from jurisdiction" and re-emphasized the fact that "[e]ach

defendant's contacts with the forum state must be assessed *individually*." 465 U.S. at 790 (emphasis added). *Calder* supports the simple proposition that an employee's actions that possess an individual (as opposed to purely representative) character will not be ignored merely because the defendant is a corporate agent; but *Calder* does not hold that contacts of a purely representative nature are sufficient to satisfy due process.

In *Hustler Magazine*, the companion case to *Calder*, the Court reversed a lower court's decision that it did not have jurisdiction over a corporate publisher in a libel suit. In *Hustler Magazine*, the Court discussed whether the individual owner and publisher of the magazine might also be subject to jurisdiction:

> In *Calder* . . . we today reject[ed] the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity. But jurisdiction over an employee does not automatically flow from jurisdiction over the corporation which employs him.

Hustler Magazine, 465 U.S. at 781 n.13.

Far from announcing a per se rule that employees should be subjected to individual jurisdiction for contacts arising out of performing their job for a corporation, *Hustler Magazine* and *Calder* support the unremarkable proposition that a defendant's actions also possessing an individual (as opposed to purely representative) character will not be ignored merely because the defendant is an employee.

Unanswered by either case, of course, is whether a representative's contacts that are purely representative are sufficient to establish jurisdiction over his person individually. Some courts have cited to *Hustler Magazine* and *Calder* and answered "Yes." Others have cited the same two cases and answered "No." Others sit somewhere in between. This case presents a ripe opportunity for the Court to provide the proper analytical framework for the lower courts to follow.

C. The Lower Courts Give Conflicting Answers To This Constitutional And Jurisdictional Question.

1. Jurisdictions Holding That Representative Contacts Do Not Count.

Many courts recognize that subjecting a defendant to *in personam* jurisdiction for contacts made in a purely representative capacity will often be fundamentally unfair, and therefore discount those contacts in the due process analysis. These courts consider the fiduciary shield doctrine "to be an important sub-issue under a due process analysis." *Saktides v. Cooper*, 742 F. Supp. 382, 385 (W.D. Tex. 1990). Succinctly stated:

> Considering a defendant's purely representative contacts from a due process standpoint, it would offend traditional notions of fair play and substantial justice to force employees who have occasion to do business by telephone or mail with any given number of states, to require that they defend lawsuits in those states in their individual capacity based on acts performed not for their own benefit, but for the benefit of their employer.

Saktides, 742 F. Supp. at 387.

Several Circuit Courts of Appeal have considered the matter as one that must follow "traditional lines of [a] due process analysis." *Columbia Briargate Co. v. First Nat'l Bank*, 713 F.2d 1052, 1065 (4th Cir. 1983); *Lehigh Valley Indus. v. Birenbaum*, 527 F.2d 87, 92-93 (2d Cir. 1975); *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 931 (6th Cir. 1974); *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277, 1280-81 (10th Cir. 1969).

In *Weller*, the Sixth Circuit long ago expressed "serious doubt" that personal jurisdiction over corporate officers acting in a representative capacity would be fundamentally fair under the Due Process Clause. *Weller*, 504 F.2d at 931. In *Wilshire Oil*, the Tenth Circuit did the same. *Wilshire Oil*, 409 F.2d at 1280-81.

Because "the fiduciary shield doctrine and the due process clause are animated by a similar concern for fairness," *McClelland v. Watling Ladder Co.*, 729 F. Supp. 1316, 1321 (W.D. Okla. 1990), other courts have concluded that personal jurisdiction over a person acting in a representative capacity does not comport with the notions of fair play and substantial justice. *See Violanti v. Emery Worldwide*, 847 F. Supp. 1251, 1256 (M.D. Penn. 1994); *Hoag v. Sweetwater Int'l*, 857 F. Supp. 1420, 1426 (D. Nev. 1994); *McClelland*, 729 F. Supp. at 1321; *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 162-63 (D.C. App. 2000).

2. Jurisdictions Holding That Representative Contacts *Do* Count.

Other courts reject the notion that contacts made in a representative capacity should be given any lesser weight than those contacts made in an individual capacity. These courts subject a representative to personal jurisdiction even though his only contacts with the forum are made in a representative capacity for a corporate entity. These jurisdictions treat this as a matter of *state* law, rather than as a Constitutional due process matter.

The Ninth Circuit, for example, has held that representative contacts are to be viewed as a matter of "equity." *See Davis v. Metro Prods., Inc.*, 885 F.2d 515, 521 (9th Cir. 1989) (applying Arizona law and holding that jurisdiction is not "equitably limited") (citing *Calder* and *Hustler Magazine*). The New York Court of Appeals considers the issue one of "public policy." *Kreutter v. McFadden Oil Corp.*, 522 N.E.2d 40, 47 (N.Y. 1988).

Other courts, such as the Eastern District of Arkansas and the Eastern District of Michigan, cite to this Court's decisions in *Calder* and *Hustler Magazine,* but still treat the matter as one of state law. *Torchmark Corp. v. Rice*, 945 F. Supp. 172, 176 (E.D. Ark. 1996); *Superior Consulting Co., Inc. v. Walling*, 851 F. Supp. 839, 844 (E.D. Mich. 1994). *Torchmark* holds that the fiduciary shield doctrine

is simply a "state imposed limitation" that was "removed by the [Arkansas] legislature." *Id.*

Some courts simply fail to afford the doctrine constitutional significance. *See, e.g., Springs Indus., Inc. v. Gasson*, 923 F. Supp. 823, 826 (D. S.C. 1996); *Estabrook v. Wetmore*, 529 A.2d 956, 957 (N.H. 1987); *Norkol/Fibercore, Inc. v. Gubb*, 279 F. Supp. 2d 993, 996 (E.D. Wis. 2003); *Shipley Co. v. Clark*, 728 F. Supp. 818, 821 (D. Mass. 1990); *Seiber v. Campbell*, 810 So.2d 641, 645 (Ala. 2001); *Taylor-Rush v. Multitech Corp.*, 265 Cal. Rptr. 672, 681 (Cal. Ct. App. 1990).

The District of Delaware has predicted that the Delaware Supreme Court would refuse to recognize the fiduciary shield doctrine, though it also recognized that "constitutional fairness concerns" must have their proper role. *Mobil Oil Corp. v. Advanced Envtl. Recycling Techs., Inc.*, 833 F. Supp. 437, 442-43 (D. Del. 1993).

The Kansas Supreme Court is dismissive of the doctrine, holding that jurisdiction over a non-resident corporate representative "is predicated merely upon jurisdiction over the corporation itself." *Anderson v. Heartland Oil & Gas, Inc.*, 249 Kan. 458, 468 (Kan. 1991). Likewise, the Supreme Court of Nebraska has held that – purely as a matter of Nebraska law – personal jurisdiction will lie "regardless of the capacity" in which a defendant has acted. *Holste v. Burlington Northern R.R.*, 592 N.W.2d 894, 909 (Neb. 1999).

3. Other Courts Are Unsure Whether The Rule Is One of State or Federal Constitutional Law.

Other courts somehow view the rule "as an equitable principle," *Allen v. Toshiba Corp.*, 599 F. Supp. 381, 384 (D.N.M. 1984), but nevertheless apply it as one of constitutional dimension. *Id.* at 388 (citing *International Shoe* and *Helicopteros*). Still other jurisdictions use a state law "fairness" test that would mirror a federal due process analysis. *See Marine Midland Bank v. Miller*, 664 F.2d 899, 903 (2d Cir. 1981); *Doe v. Thompson*, 620 So.2d 1004,

1006 (Fla. 1993); *Rollins v. Ellwood*, 565 N.E.2d 1302, 1318 (Ill. 1990). At least one other jurisdiction recognizes the existence of the doctrine, but does not know when it applies, except "in very unusual circumstances that we cannot presently foresee and articulate." *Christian Book Distrib., Inc. v. Great Christian Books,* 768 A.2d 719, 733-34 (Md. App. 2001).

Where the rule governing such a fundamental question of due process and personal jurisdiction cannot be foreseen or articulated, it is in need of repair. This Court may provide the lower courts with guidance on the issue and put an end to the divergent applications of what should be a more simple rule.

D. Why It Is Important To Resolve This Question?

A critical element of a due-process, minimum-contacts analysis is that the exercise of jurisdiction be foreseeable to the defendant; in other words, "the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 296. "[I]n each case . . . there must be some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

These basic elements of minimum contacts are lacking where an individual's only contacts with a forum are in a representative capacity, as the person's contacts are not truly his own, but rather are those of his employer. Because none of the defendant's representative acts are his own, they do not amount to the purposeful transaction of business by that defendant individually.

The question left unresolved by *Burger King*, *Helicopteros*, and *Carnival Cruise Lines* is directly related to whether contacts in a purely representative capacity may be attributed to an individual for purposes of personal jurisdiction, as *Burger King* itself referred back to *Hustler*

Magazine in discussing this issue. *See Burger King*, 471 U.S. at 472 (citing *Hustler Magazine*, 465 U.S. at 774). Indeed, the Court has never expounded upon how these factors, or the notions of fair play and substantial justice, should be measured where a person's contacts are in a purely representative capacity.

The Court should clarify how jurisdiction over Mr. Cloeren fits into the statements in *Hustler Magazine* and *Calder* that "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him" and that while an employee *qua* employee is not "somehow insulate[d] from jurisdiction" nevertheless his "contacts with the forum state must be assessed *individually*."[16] This case presents a ripe opportunity for the Court to provide the proper analytical framework for the lower courts to follow.

CONCLUSION

For all the reasons stated above, Mr. Cloeren respectfully asks this Court to grant his Petition.

Respectfully submitted,

DANIEL KELLY
REINHART BOERNER VAN DEUREN S.C.
(Counsel of Record)
Attorney for Petitioner Peter F. Cloeren

January 2007

[16] *See Hustler Magazine*, 465 U.S. at 781 n.13; *Calder*, 465 U.S. at 790.

Supreme Court, U.S.
FILED
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06-949 JAN - 8 2006
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

PETER F. CLOEREN,

Petitioner,

v.

ROBERT L. DRUSCHEL,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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12. Affidavit of Dennis M. Sullivan with attached exhibit 7 only dated June 10, 2005 in *Druschel v. Cloeren*, Case No. 2003CV359. Exhibit 7 contains selected portions of the Deposition of Robert L. Druschel taken January 10, 2005 in the case *The Cloeren Company v. Druschel* in the District Court of Orange County, Texas, 128th Judicial District, Case No. A-031037-C. Selected pages are as follows: pages 114-117, 150-153, 158-161, 174-177, 178-181. (R. 41).....App. 76

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723 N.W.2d 430

COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2575 **Cir. Ct. No. 2003CV359**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ROBERT L. DRUSCHEL,

PLAINTIFF-RESPONDENT,

v.

PETER F. CLOEREN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court of Chippewa County: RODERICK A. CAMERON, Judge, *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Peter Cloeren appeals a summary judgment awarding Robert Druschel the entire outstanding balance Cloeren owed under a promissory note. Cloeren argues: (1) he is not subject to personal jurisdiction in Wisconsin; and (2) he is entitled to offset the amount of damages caused by Druschel's breaches of his employment and non-compete contracts. We conclude Cloeren is subject to personal jurisdiction in Wisconsin

and he is not entitled to offsets for Druschel's alleged contractual breaches. Accordingly, we affirm the judgment.

BACKGROUND

¶2 Cloeren is a Texas resident and majority shareholder of The Cloeren Company, also known as Cloeren, Inc. In 1997, Cloeren and others, on behalf of Cloeren, Inc., sought to purchase a Wisconsin business, Production Components/Chippewa Valley Die, Inc. The company was owned by Druschel and two other stockholders. Druschel demanded a personal guarantee to complete the sale. Accordingly, Cloeren executed a secured promissory note in his individual capacity for partial payment of Druschel's stock. The note allowed for offsets as outlined in the stock purchase agreement. The sale was completed and the new company was called Production Components-Cloeren, Inc. At the time of the sale, Druschel also entered into two agreements with Production Components, an employment contract and a non-compete agreement.

¶3 In February 1998, Cloeren, in his individual capacity, signed a replacement secured promissory note to Druschel. Cloeren made several payments in accordance with the original and replacement notes between September 1997 and September 2002. In June 2003, Druschel notified Cloeren that he would exercise his right to full payment of the replacement note as of September 1, 2003. Cloeren made no payments after September 2002, and Druschel commenced this action in September 2003.

¶4 Cloeren moved to dismiss, contending the court lacked personal jurisdiction over him because he did not have sufficient contacts with Wisconsin. The circuit court denied Cloeren's motion, concluding it had jurisdiction by

virtue of Wisconsin's long-arm statute, specifically Wis. Stat. § 801.05(1)(d),[1] and that exercising jurisdiction did not violate due process.

¶5 The parties filed cross-motions for summary judgment in June 2005. Cloeren contended he was entitled to offsets on the note due to Druschel's violations of the employment contract and non-compete agreement. Druschel contended he was entitled to full payment. The circuit court denied Cloeren's motion and granted Druschel's motion. It concluded that, even if Cloeren were entitled to offsets, he was barred from obtaining them by claim preclusion. The court also concluded that Cloeren's claims were barred because he did not provide appropriate notice of his right to offset. Judgment was entered in Druschel's favor.

DISCUSSION

Personal Jurisdiction

¶6 Cloeren argues he is not subject to personal jurisdiction in Wisconsin. Whether a court has personal jurisdiction presents a question of law that we review independently. ***Capitol Fixture & Woodworking Group v. Woodma Distribs., Inc.***, 147 Wis. 2d 157, 160, 432 N.W.2d 647 (Ct. App. 1988). Questions of personal jurisdiction involve a two-step inquiry. ***Kopke v. A. Hartrodt S.R.L.***, 2001 WI 99, ¶8, 245 Wis. 2d 396, 629 N.W.2d 662. First, we examine whether a defendant is subject to jurisdiction under Wisconsin's long-arm statute, WIS. STAT.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

§ 801.05. ***Id.*** If the statutory requirements are satisfied, we examine whether Wisconsin's exercise of jurisdiction comports with federal due process requirements. ***Id.***

A. Wisconsin's Long-Arm Statute

¶7 Cloeren argues he is not subject to personal jurisdiction under WIS. STAT. § 801.05(1)(d), which provides personal jurisdiction over a defendant who "[i]s engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise." Generally, a defendant has "substantial and not isolated" contacts with the state if the defendant "solicit[s], create[s], nuture[s], or maintain[s], whether through personal contacts or long-distance communications, a continuing business relationship with anyone in the state." ***Stauffacher v. Bennett***, 969 F.2d 455, 457 (7th Cir. 1992).

¶8 Wisconsin courts consider five factors to determine whether activities are "substantial and not isolated" under WIS. STAT. § 801.05(1)(d): (1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the source of the contacts and their connection with the cause of action; (4) the interests of the State of Wisconsin; and (5) the convenience of the parties. ***Nagel v. Crain Cutter Co.***, 50 Wis. 2d 638, 648-50, 184 N.W.2d 876 (1971).

¶9 Cloeren argues the quantity, quality and nature of his contacts with Wisconsin were minimal. He argues that he visited Wisconsin infrequently, that he was barely involved in the purchase of Druschel's stock, and that he did not travel to Wisconsin to negotiate the deal.

¶10 Druschel responds that the circuit court's factual findings support its conclusion it has personal jurisdiction. Regarding the quantity, quality and nature of the contacts, the circuit court found:

> 1. [Cloeren] has had six to eight visits to the State of Wisconsin since 1997. Said visits lasted from two to four days at a time;
>
> 2. [Cloeren] had approximately four conversations a week with Douglas Darrow while Douglas Darrow was in the State of Wisconsin. The topics of these conversations were sales, marketing, pending orders, employees, manifold designs for dies, and personal matters;
>
> 3. [Cloeren] had approximately two conversations a month with Leigh Darrow while Leigh Darrow was in the State of Wisconsin. The topics of these conversations generally regarded sales of Cloeren products;
>
> 4. [Cloeren] is involved in the management and owner of Cloeren, Inc.
>
> 5. Cloeren, Inc. is the owner of Production Components-Cloeren, Inc.
>
> 6. [Cloeren] is actively involved in the daily operation of Production-Components-Cloeren, Inc. located in the City of Eau Claire, Chippewa County, Wisconsin;
>
> 7. [Cloeren] has had continuous and systematic general business contacts with the State of Wisconsin.

These findings demonstrate that Cloeren made a significant number of contacts with Wisconsin, including six to eight personal visits and frequent telephone conversations

with Wisconsin residents. Additionally, personal visits are the highest quality of contact. *See* ***Dorf v. Ron March Co.***, 99 F.Supp.2d 994, 997 (E.D. Wis. 2000). "The next highest quality of contact is personal contact of another type." ***Id.*** Here, Cloeren made frequent personal contact by virtue of telephone calls to Wisconsin. The first and second ***Nagel*** factors weigh in favor of personal jurisdiction.

¶11 On the third ***Nagel*** factor, Cloeren argues that Druschel's claim has no connection to Cloeren's Wisconsin contacts and that most of his Wisconsin contacts were made after the note was executed. Druschel responds, and we agree, that Cloeren's contacts were the direct result of his personal stake in the business, evidenced by the promissory note he personally signed. The source of the contacts was the purchase and operation of the Wisconsin corporation, including the notes that are the subject of this litigation. Thus, the third ***Nagel*** factor weighs in favor of jurisdiction.

¶12 Regarding the fourth and fifth ***Nagel*** factors, Cloeren contends Wisconsin has no interest aside from one of its citizens being a party to the action and that Wisconsin is an inconvenient forum for him because it is located thousands of miles from his home state. However, Wisconsin has an interest in protecting its residents from breaches of contract. *See* ***Dorf***, 99 F.Supp.2d at 998. Additionally, as Druschel argues, because the transactions here were largely "paper" transactions, the documentary evidence is equally available in either venue, with the relevant witnesses residing largely in Wisconsin. Thus, these ***Nagel*** factors also weigh in Wisconsin's favor. In sum, we conclude that Cloeren engaged in "substantial not

isolated activities" in Wisconsin, and WIS. STAT. § 801.05(1)(d) provides personal jurisdiction.[2]

B. Due Process

¶13 Cloeren also argues that, even if Wisconsin's long-arm statute is satisfied, the exercise of personal jurisdiction over him in Wisconsin violates due process under the Fourteenth Amendment to the United States Constitution.

> Due process analysis presents two inquiries. The first inquiry is whether the defendant purposefully established minimum contacts in the forum State. On this question, the plaintiff carries the burden. If this inquiry is answered affirmatively, then the defendant's forum-state contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice. The defendant carries the burden on this question.

Kopke, 245 Wis.2d 396, ¶23 (quotations and citations omitted). Our conclusion that Cloeren falls within Wisconsin's long-arm statute creates a rebuttable presumption that federal due process is also satisfied. *See* ***Harley-Davidson Motor Co. v. Motor Sport, Inc.***, 960 F.Supp. 1386, 1391 (E.D. Wis. 1997).

¶14 Minimum contacts require "the defendant's conduct and connection with the forum State are such that

---

[2] Because we conclude personal jurisdiction exists by virtue of WIS. STAT. § 801.05(1)(d), we need not address Druschel's alternative arguments that jurisdiction is also proper under § 801.05(5)(c) and (e).

he should reasonably anticipate being haled into court there." ***Burger King Corp. v. Rudzewicz***, 471 U.S. 462, 474 (1985). As discussed above, Cloeren made six to eight personal visits to Wisconsin, made frequent contact by telephone and was involved in the daily operation of a Wisconsin company.

¶15 However, Cloeren argues that the contacts of an individual, made as an agent of a business, do not count toward the "minimum contacts" required for personal jurisdiction. This concept, commonly referred to as the fiduciary shield doctrine, has not been adopted in Wisconsin. *See* ***Norkol/Fibercore, Inc. v. Gubb***, 279 F.Supp.2d 993, 998 (E.D. Wis. 2003). Thus, Cloeren's contacts are considered regardless whether those contacts were made on behalf of a business. We conclude Cloeren's Wisconsin contacts amount to sufficient minimum contacts to satisfy due process.

¶16 Cloeren also argues jurisdiction does not comport with fair play and substantial justice. The United States Supreme Court has articulated five factors to consider: (1) the forum state's interest in adjudicating the dispute; (2) the plaintiff's interest in obtaining convenient and effective relief; (3) the burden on the defendant; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the states in furthering fundamental substantive social policies. ***Burger King***, 471 U.S. at 477.

¶17 Cloeren argues that Druschel could obtain relief in a Texas forum, that Cloeren would prefer a Texas forum, and that a Wisconsin judgment would have to be enforced against Cloeren in Texas. However, these arguments do not undermine Wisconsin's interest in seeing

that a Wisconsin resident can obtain relief in a Wisconsin court for damages arising out of a transaction in which a Wisconsin corporation was purchased. Further, Wisconsin is not an inconvenient forum because, as indicated, documentary evidence is equally available in either forum and the witnesses are located primarily in Wisconsin. Cloeren offers no argument regarding whether the shared interests of the states would be negatively affected by Wisconsin jurisdiction. In sum, Cloeren has not made a "compelling case that the presence of some other considerations would render jurisdiction unreasonable." *See* ***id.***

¶18 Cloeren also complains that the circuit court failed to distinguish between general and specific jurisdiction. "Specific jurisdiction is proper when the case itself arises out of or is related to the defendant's contact with the state; general jurisdiction is allowed when the suit does not arise from the defendant's relationship with the state." ***Harley-Davidson***, 960 F.Supp. at 1391. Cloeren argues that neither specific nor general jurisdiction is appropriate here; Druschel responds that the circuit court's factual findings support both types of jurisdiction.

¶19 Specific jurisdiction focuses on the relationship among the defendant, the forum and the litigation. ***Id.*** The circuit court found "[t]he only issue is whether [Cloeren] paid the balance due on the promissory note" and "[j]urisdiction over [Cloeren] in this lawsuit arises out of and is related to [Cloeren's] contacts with the State of Wisconsin." These findings support a conclusion that specific jurisdiction lies here: there is a connection between Cloeren's contact with Wisconsin and Druschel's claim. Because we conclude that Wisconsin has specific jurisdiction over Cloeren, we need not address whether general jurisdiction exists, as well.

Offsets

¶20 Cloeren argues the circuit court erred by granting summary judgment in Druschel's favor for the entire value of the note without offsetting damages for Druschel's breaches of contract. We review a summary judgment independently, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶21 The circuit court concluded, and Druschel does not challenge on appeal, that Cloeren has standing to assert those offsets to which Cloeren, Inc., is entitled under the terms of the stock purchase agreement.[3] The issue that remains is whether the stock purchase agreement allows offset for Druschel's alleged breaches of the employment contract and non-compete agreement. This issue involves the interpretation of a contract, which presents a question of law that we review independently. ***Farm Credit Servs. v. Wysocki***, 2001 WI 51, ¶8, 243 Wis. 2d 305, 627 N.W.2d 444. If the terms of the contract

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[3] The original note provided, "This note is subject to all offsets, credits and deductions allowed Maker under the terms of the Agreement, which is incorporated herein by reference." The replacement note provides:

> The original promissory note was express made subject to all offsets, credits and deductions allowed Maker under the terms of the Agreement, and an adjustment to the original promissory note of a principal reduction of $78,159.00 was agreed upon by Payee pursuant to Section 2.2 of the Agreement, as the Stockholders' Equity on the closing date statement that was prepared subsequent to the original promissory note is less than the Base Equity required in the Agreement.

are plain and unambiguous, it is our duty to construe the contract according to its plain meaning even though one of the parties may have construed it differently. *Id.*, ¶12.

¶22 Section 10.1.4 of the stock purchase agreement states, "An amount for which Cloeren or the Company is entitled to receive indemnification under this Agreement is an 'Indemnified Loss.'" Cloeren argues Druschel's breaches are indemnified losses. First, Cloeren contends Druschel's breaches fall under § 10.1.1 of the stock purchase agreement, which requires Druschel to indemnify Cloeren for "[a]ny material inaccuracy in any representation or the breach of any warranty made by the Stockholders, the Company or any of them, in or pursuant to this Agreement." Cloeren argues the language "pursuant to" the stock purchase agreement demonstrates the parties' intent to incorporate the representations and warranties made in Druschel's employment contract and non-compete agreement into the stock purchase agreement. Thus, Cloeren concludes breaches of those additional contracts are indemnified losses under the stock purchase agreement.

¶23 However, § 4 of the stock purchase agreement specifically articulates the "representations and warranties" made by Druschel. Neither Druschel's employment contract nor his non-compete agreement is included as part of those representations or warranties. Thus, the plain language of the stock purchase agreement does not include breaches of Druschel's employment contract or non-compete agreement as indemnified losses under § 10.1.1.

¶24 Cloeren also argues Druschel's breaches are indemnified losses under § 10.1.4. Section 10.1.4 requires Druschel to indemnify Cloeren for Druschel's failure to

"perform or observe any term, provision, covenant, agreement or condition in this Agreement." However, Druschel's compliance with his employment contract is not a "term, provision, covenant, agreement or condition" of the stock purchase agreement.

¶25 Cloeren contends the employment contract and non-compete agreement should be incorporated into the stock purchase agreement. However, § 15.2 of the stock purchase agreement contains an integration clause, providing that it encompasses the entire agreement of the parties. Thus, the unambiguous language of the stock purchase agreement does not include breaches of either the employment contract or non-compete agreement as indemnified losses and, therefore, Cloeren is not entitled to offset damages for the alleged breaches from the amount due under the promissory notes.[4]

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports.

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[4] Because we conclude the notes and stock purchase agreement do not include breaches of the employment contract or non-compete agreement as indemnified losses, we need not address: (1) whether Cloeren raised genuine issues of material fact that Druschel breached the agreements; (2) whether Cloeren waived his argument that he is entitled to offset under the non-compete agreement; (3) whether the non-compete agreement violates WIS. STAT. § 103.465; (4) whether Cloeren waived his right to offset by failing to provide timely notice as required by the stock purchase agreement; and (5) whether claim preclusion bars Cloeren from claiming offset. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (court should decide cases on the narrowest possible grounds).

STATE OF WISCONSIN	CIRCUIT COURT	CHIPPEWA COUNTY

ROBERT L. DRUSCHEL
3538 Chippewa River Drive
Eau Claire, Wisconsin 54703

Plaintiff,

vs.

CASE NO. 03 CV 359

Case Code: 30301

PETER CLOEREN
3410 Interstate 10 West
Orange, Texas 77630

Defendant.

JUDGMENT

(Filed Aug. 29, 2005)

On motion of Plaintiff Robert L. Druschel in this action for summary judgment in favor of the Plaintiff and against Defendant Peter F. Cloeren pursuant to §802.08 of the Wisconsin Statues having been heard and considered, with the motion having been granted by the court, and entry of judgment directed accordingly;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. Plaintiff Robert L. Druschel is entitled to a judgment entered in his favor and against Defendant Peter F. Cloeren in the sum of $1,417,063.95, together with interest from September 1, 2002 to August 11, 2005 in the sum of $271,028.05.

2. Plaintiff Robert L. Druschel is entitled to his costs and reasonable attorney's fees in this action which are to be hereinafter taxed and hereinafter inserted.

3. Defendant Peter F. Cloeren and Escrow Agent Mauriceville Bank deliver possession of Twenty two thousand (22,000) shares of class B preferred stock of The Cloeren Company to Plaintiff Robert L. Druschel forthwith.

Dated this 29th day of August, 2005.

BY THE COURT:

/s/ Roderick A. Cameron
Roderick A. Cameron
Circuit Court Judge – Branch I
Chippewa County, Wisconsin

STATE OF WISCONSIN	CIRCUIT COURT	CHIPPEWA COUNTY

ROBERT L. DRUSCHEL
3538 Chippewa River Drive
Eau Claire, Wisconsin 54703

Plaintiff,

vs.

CASE NO. 03 CV 359

Case Code: 30301

PETER F. CLOEREN
3410 Interstate 10 West
Orange, Texas 77630

Defendant.

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF ROBERT L. DRUSCHEL AND DENYING SUMMARY JUDGMENT MOTION OF DEFENDANT PETER F. CLOEREN

(Filed Aug. 26, 2005)

The motion of Plaintiff Robert L. Druschel for summary judgment and the motion of Defendant Peter F. Cloeren for summary judgment both came on to be heard on August 11, 2005 upon due notice. Appearing at the hearing was Plaintiff Robert L. Druschel by his attorney, Steven R. Cray of Wiley Law, S.C. Defendant Peter F. Cloeren did not appear in person but appeared by his attorney, Dennis M. Sullivan of Herrick & Hart, S.C.

The court having considered the pleadings in this case, the briefs submitted by the parties, the supporting documents submitted by the parties for consideration in support and in opposition to motions, and the court having stated its decision on these motions on the record;

IT IS HEREBY ORDERED, the motion of Plaintiff Robert L. Druschel for summary judgment pursuant to §802.02 of the Wisconsin Statutes is granted. Plaintiff Robert L. Druschel is entitled to a judgment entered in his favor and against Defendant Peter F. Cloeren in the sum of $1,417,063.95, interest from September 1, 2002 until August 11, 2005 in the sum of $271,028.05, and his costs and reasonable attorney's fees in this action which are to be hereinafter taxed and hereinafter inserted.

IT IS FURTHER ORDERED, Defendant Peter F. Cloeren and Escrow Agent Mauriceville Bank deliver possession of the following collateral to Plaintiff Robert L. Druschel forthwith:

Twenty two thousand (22,000) shares of class B preferred stock of The Cloeren Company.

IT IS FURTHER ORDERED, the summary judgment of Defendant Peter F. Cloeren is hereby denied.

Dated this 26th day of August, 2005.

BY THE COURT:

/s/ Roderick A. Cameron
Roderick A. Cameron
Circuit Court Judge – Branch I
Chippewa County, Wisconsin

STATE OF WISCONSIN	CIRCUIT COURT Branch I	CHIPPEWA COUNTY

ROBERT L. DRUSCHEL,

Plaintiff,

vs.

PETER CLOEREN,

Defendant.

TRANSCRIPT OF PROCEEDINGS
Case No. 03CV359
(Judge's decision)

The above-entitled matter coming on to be heard before the Honorable Roderick A. Cameron, Circuit Court Judge, on the 11th day of August, 2005, commencing at the hour of 8:40 a.m. in the Courthouse in the City of Chippewa Falls, County of Chippewa, State of Wisconsin.

APPEARANCES:

STEVEN R. CRAY, Wiley Law, Chippewa Falls, Wisconsin, appearing as counsel for and on behalf of the Plaintiff.

DENNIS M. SULLIVAN, Herrick & Hart, Eau Claire, Wisconsin, appearing as counsel for and on behalf of the Defendant.

[2] PROCEEDINGS:

THE COURT: This is Case 2003CV359. The plaintiff is Robert L. Druschel. The defendant is Peter F. Cloeren. Mr. Druschel, I believe, is here with his attorney, Steven Cray. Mr. Cloeren is not here, but appears by his attorney, Mr. Sullivan. The Court has received summary judgment motions for both sides. This is the time for the Court to announce the decision.

I have reviewed all the briefs, attachments to the briefs, in particular, the supporting documents and, unless there is anything somebody wants to add, I will announce my decision. I don't have any issues that I think I need argument.

Basically here, there are no issues of material fact. The amount of the note from Peter Cloeren to Robert Druschel, the payments made to date, are not in dispute. The balance due is challenged by Mr. Cloeren who claims offsets under the terms of the Promissory Note, Replacement Promissory Note, Stock Purchase Agreement and Employment Agreement. Mr. Cloeren's counterclaim asserts affirmative defenses alleging Mr. Druschel violated the terms of the Employment Agreement and these violations entitle Mr. Cloeren to offsets of the unpaid balance on the [3] Promissory Note.

My conclusion is, and I'll explain after in a minute, as a matter of law, Mr. Druschel is entitled to recover all amounts due on the Replacement Promissory Note and Mr. Cloeren is not entitled to any offsets.

One of the oddities in this case is when Mr. Druschel sold stock in Production Components to Cloeren, Inc., the Stock Purchase Agreement was signed by Mr. Druschel and Cloeren, Inc., among others, but Peter Cloeren did not sign it. The Promissory Note, the Replacement Promissory Note, were each signed by Mr. Cloeren individually. Cloeren, Inc., the corporation, did not sign the promissory notes.

My thinking on that is that Peter Cloeren appears to be entitled to offsets as allowed by the Stock Purchase Agreement on the amount he owes on the Promissory Note because of the specific language of the note and Stock

Purchase Agreement, which give him that right, and also because of the language in the Replacement Promissory Note which reflects a mandatory adjustment of the purchase price on the sale of Production Components to Cloeren, Inc. This adjustment strongly implies that Mr. Druschel, Peter Cloeren and Cloeren, Inc. intended to allow offsets to the amount due Mr. Druschel under the Promissory Note and, later, [4] the Replacement Promissory Note.

The Replacement Promissory Note adjusted the payment. I can't remember the reason why, but something. It was, basically, a mandatory adjustment, as I interpreted the documents.

This analysis gives meaning to language in these documents that otherwise would have no meaning. The general rule is that all language in a contract is to be given meaning whenever possible. The promissory notes and the Stock Purchase Agreements – or Agreement, singular – having references to Peter Cloeren in the notes and to the corporation in the Stock Purchase Agreement do not interact very well. Because Peter Cloeren and the corporation, Cloeren, Inc., now known as Production Components-Cloeren, Inc., are parties to only the promissory notes or the Stock Purchase Agreement, but not both, it is impossible to give meaning to all the language without this Court giving the combination of these documents an interpretation that appears to have been intended by all parties.

It appears further that offset language in the Stock Purchase Agreement must be used by Peter Cloeren because Production Components-Cloeren, Inc. has no ability to use the offset. They don't owe [5] Mr. Druschel

any money – the corporation doesn't owe Mr. Druschel any money and, therefore, gets no benefit, even if there are some offsets. Peter Cloeren, who was not a signatory – the record should reflect we are having the usual garbage dumping outside the courtroom. Peter Cloeren, who is not a signatory of the Stock Purchase Agreement, would need to be able to claim these offsets to give meaning to the language in both documents.

This seems to be the most logical interpretation which gives full meaning to the notes and the Stock Purchase Agreement. Therefore, I need to look at these agreements to see what is allowed for offsets. My conclusion is that Peter Cloeren is not entitled to any of the offsets allowed under the promissory notes, the original one and the Replacement Promissory Note, or the Stock Purchase Agreement.

Assuming that Peter Cloeren is entitled to claim the offsets allowed by the Stock Purchase Agreements or Agreement, these offsets are limited to the indemnified losses specified in the Stock Purchase Agreement and Peter Cloeren is not entitled to claim offsets not actually allowed by the Stock Purchase Agreement.

The Stock Purchase Agreement defines [6] indemnified losses in Sections 10.1.1 through 10.1.4. Peter Cloeren has not alleged a violation of these sections, but rather a violation of the Employment Contract. Had Peter Cloeren alleged violations of the Stock Purchase Agreement, these claims would be barred by his failure to provide notice to Robert Druschel according to the terms of the Stock Purchase Agreement. The Stock Purchase Agreement requires notice of violations of the Stock Purchase Agreement within two years of September 15, 1997, except

where Section 10.1.3, which allows a five-year limitation for environmental liabilities. In addition, Section 4.9 allows notice until the expiration of the statute of limitations for tax liabilities. And I should add that the information I have is that Mr. Cloeren is not alleging either of these items as part of his basis for an offset. Anyway, no such notice on any violation of these sections was ever provided to Robert Druschel by Peter Cloeren or by Production Components-Cloeren, Inc., regardless of the specific time limit. Peter Cloeren's argument that Mr. Druschel would know of his own violations does not enable Peter Cloeren or Production Components-Cloeren, Inc. to ignore the notice requirement of the Stock Purchase Agreement.

The Employment Contract does not give Peter [7] Cloeren any offsets either. Peter Cloeren may not raise the alleged violations of the Employment Contract for two reasons.

First, the alleged violations of the Employment Contract do not fall within the list of indemnified losses in the Stock Purchase Agreement. The Stock Purchase Agreement does not include Employment Contract violations within its list of indemnified losses. Therefore, Peter Cloeren may not use the Stock Purchase Agreement to claim the offsets alleged to have arisen from Robert Druschel's violation of the Employment Agreement.

Second, assuming that the language of the Stock Purchase Agreement entitles Peter Cloeren to have Robert Druschel's alleged violations of the Employment Contract Agreement offset the balance Peter Cloeren owes on the Promissory Note, claim preclusion bars these offsets. Peter Cloeren must make his claim through the Stock Purchase

Agreement and he is limited to offsets which Production Components-Cloeren, Inc. could have asserted had it been the payor on the Promissory Note. Peter Cloeren, himself, has no standing, no separate rights, under either the Employment Agreement or Stock Purchase Agreement to claim offsets for violations of the Employment [8] Agreement.

An earlier case in this court, 2001CV80, where Production Components-Cloeren, Inc. sued Mr. Druschel and others, dismissed Production Components-Cloeren, Inc.'s noncontract claims against Robert Druschel. Violations of the Employment Agreement that were not alleged in that lawsuit are now barred. And this is based upon the recent decision in *Menard, Inc. vs. Lightway Lighting Products*, 2005 WI 98, 698 N.W. 2d 738. I do not have a Wisconsin cite. I didn't find one. That decision ruled claim preclusion bars claims that could have been raised in an earlier case involving the same facts but which were not raised. Peter Cloeren's affirmative defenses in this case involve the same facts as did his claim against Robert Druschel in the civil case, 2001CV80.

Therefore, I conclude that Production Components-Cloeren, Inc. cannot recover against Robert Druschel for his alleged violations of the Employment Agreement, and if the corporation can't, then Mr. Cloeren, himself, is also unable to do so because he is limited to offsets which Production Components-Cloeren, Inc. is able to assert.

The attorneys have argued the validity of the Employment Contract and the effect of the Employment [9] Contract on the Noncompete Agreement. I don't think I need to decide that and I have not decided that.

So my conclusion is, other than Peter Cloeren's claims for offsets, there is no difficulty computing the balance due on the Promissory Note. As a matter of law, Peter Cloeren is not entitled to any offsets. Therefore, Robert Druschel is entitled to summary judgment as demanded in the complaint, including interest, costs and actual attorney fees.

Are there any things that need to be explained or any questions?

MR. CRAY: No, Your Honor.

MR. SULLIVAN: Your Honor, I will be requesting a transcript. I believe that the Court has misunderstood some of the basic facts in the case which may or may not make a difference in the Court's ultimate decision. I will be bringing a motion for reconsideration. I don't know if you want to set it at this time or put it off.

THE COURT: I can put it off. You need to get my reporter's written request form. Years ago in another state somebody requested a transcript not in writing and then denied requesting it, so he is very cautious about that.

If there is nothing else, that's it for this [10] morning.

(Conclusion of record at 8:55 a.m.)

[11] STATE OF WISCONSIN)
) ss. CERTIFICATE
COUNTY OF CHIPPEWA)

I, Eric W. Olson, Official Court Reporter in and for the County of Chippewa, State of Wisconsin, do hereby certify that I reported the above matter on August 11, 2005, and that the foregoing transcript, consisting of 10 pages, has

been carefully compared by me with my stenographic notes as taken by me and by me thereafter transcribed, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge.

Dated this 16th day August, 2005.

/s/ Eric W. Olson
Eric W. Olson
Official Court Reporter

STATE OF WISCONSIN	CIRCUIT COURT	CHIPPEWA COUNTY

ROBERT DRUSCHEL
3538 Chippewa River Drive
Eau Claire, Wisconsin 54703

Plaintiff,

vs.

Case No.: 03 CV 359

Case Code: 30301

PETER CLOEREN
3410 Interstate 10 West
Orange, Texas 77630

Defendant.

[AMENDED] ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION OVER DEFENDANT

(Filed Mar. 15, 2005)

On March 17, 2003, the Plaintiff, Robert L. Druschel, commenced the present action against the Defendant, Peter F. Cloeren. On November 12, 2003, the Defendant filed a motion to dismiss pursuant to §802.06(2) of the Wisconsin Statutes. The parties to this action have briefed this issue and submitted affidavits to support their respective positions. On February 25, 2005, the Court held a hearing on the Defendant's motion to dismiss.

Upon the records and files contained in this case and upon the affidavits submitted by the parties and having considered the arguments of counsel;

The Court finds the following:

1. The Defendant has had six to eight visits to the State of Wisconsin since 1997. Said visits lasted from two to four days at a time;

2. The Defendant had approximately four conversations a week with Douglas Darrow while Douglas Darrow was in the State of Wisconsin. The topics of these conversations were sales, marketing, pending orders, employees, manifold designs for dies, and personal matters;

3. The Defendant had approximately two conversations a month with Leigh Darrow while Leigh Darrow was in the State of Wisconsin. The topics of these conversations generally regarded sales of Cloeren products;

4. The Defendant is involved in the management and owner of Cloeren, Inc.

5. Cloeren, Inc. is the owner of Production Components-Cloeren, Inc.

6. The Defendant is actively involved in the daily operation of Production Components-Cloeren, Inc. located in the City of Eau Claire, Chippewa County, Wisconsin;

7. The Defendant has had continuous and systematic general business contacts with the State of Wisconsin.

8. The contacts with the State of Wisconsin were substantial in nature and quality;

9. The visits were not the type of visits where someone changes planes or comes to the State of Wisconsin simply because a person has been sued;

10. The telephone calls constitute substantial contact with the State of Wisconsin;

11. The personal visits constitute substantial contact with the State of Wisconsin;

12. The State of Wisconsin has an interest in the present case in seeing the Plaintiff, a resident of Chippewa County, Wisconsin was able to obtain relief in Wisconsin courts;

13. The Circuit Court for Chippewa County, Wisconsin is a convenient forum for the Plaintiff;

14. The Defendant, in approximately 2001, caused a lawsuit by a business he owns to be commenced against several individuals in the State of Wisconsin, including the present Plaintiff;

15. The legal issues in the present case are not complicated. It is unlikely the case will involve much discovery. The only issue is whether the Defendant paid the balance due on the promissory note. Determination of the issues will largely rely on documentation. The burden on the Defendant for defending this case in the State of Wisconsin is therefore not significant;

16. The State of Wisconsin has a great interest in having the case adjudicated here. It is in the Plaintiff's interest in obtaining convenient and effective relief;

17. The interstate judicial system's interest in obtaining the most efficient resolution of the controversy is great and can be accomplished in the State of Wisconsin;

18. The shared interest of the several states in furthering fundamental and substantive social policies, such as are relevant in the present case, are

not impeded by keeping the action in the State of Wisconsin.

The Court therefore concludes:

1. The Defendant is subject to the jurisdiction of the State of Wisconsin under the Wisconsin long-arm statute, in particular §801.05(1)(d);

2. Jurisdiction over the Defendant in this lawsuit arises out of and is related to the Defendant's contacts with the State of Wisconsin;

3. The exercise of jurisdiction in this case comports with constitutional due process requirements;

4. The Defendant has purposefully established minimum contacts the State of Wisconsin;

5. The Defendant's contacts with the State of Wisconsin are such that the assertion of personal jurisdiction over the Defendant will comport with fair play and substantial justice. The Defendant has purposefully directed his activities at businesses and residents of State of Wisconsin;

6. Personal jurisdiction over the Defendant is reasonable based upon the forum's state's interest in adjudicating the dispute; the Plaintiff's interest in obtaining convenient and effective relief; the burdens upon the Defendant; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest in the several states in furthering fundamental substantive social policies.

Upon these findings and conclusions;

IT IS HERBY ORDERED:

1. The motion of the Defendant to dismiss is hereby denied;

2. The Defendant is hereby ordered to file an answer to the Complaint of the Plaintiff within twenty days;

3. A scheduling conference shall be held in this matter on March 24, 2005 at 8:15 a.m.

Dated this 15th day of March, 2005.

BY THE COURT:

/s/ Roderick A. Cameron
Roderick A. Cameron
Circuit Court Judge – Branch I
Chippewa County, Wisconsin

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 1	CHIPPEWA COUNTY

ROBERT DRUSCHEL

Plaintiff,

v. Case No.: 03 CV 359

PETER CLOEREN

Defendant.

ORDER

(Filed Mar. 10, 2005)

On February 25, 2005, the court rendered an oral decision on the defendant's Motion to Dismiss seeking dismissal of the plaintiff's claim based upon lack of personal jurisdiction.

IT IS ORDERED THAT:

1. The defendant's Motion to Dismiss is denied.

Dated this 8th day of March, 2005.

BY THE COURT:

/s/

Honorable Roderick A. Cameron
Circuit Court Judge, Branch 1
Chippewa County, Wisconsin

STATE OF WISCONSIN
CIRCUIT COURT CHIPPEWA COUNTY

Robert L. Druschel,

Plaintiff,

vs.

Peter F. Cloeren,

Defendant.

DECISION

Case No. 2003CV359

HONORABLE RODERICK CAMERON
CIRCUIT COURT JUDGE, PRESIDING
February 25, 2005

APPEARANCES

MR. STEVEN CRAY, Attorney at Law, appeared on behalf of Plaintiff.

MR. DENNIS SULLIVAN, Attorney at Law, appeared telephonically on behalf of Defendant.

Also Present: Robert L. Druschel.

Reported By: Doris R. Pfeiffer

[2] THE COURT: This is case 2003CV359, Robert Druschel, plaintiff, versus Peter Cloeren, defendant. Mr. Druschel appears in person with his attorney, Steven Cray. Mr. Cloeren does not appear, but his attorney, Mr. Sullivan, appears by telephone from Eau Claire. This is the time set to rule on lack of personal jurisdiction, and I've read all the briefs, I've read all the affidavits, and I've come to the conclusion that the motion ought to be denied, and I'll explain that.

First of all, it's my belief that Mr. Cloeren is subject to jurisdiction under the Wisconsin long-arm statute, in particular Section 801.05(1)(d). In this case, I believe that Mr. Cloeren is under the law engaged in substantial and not isolated activities within Wisconsin, whether the activities are wholly interstate, intrastate or otherwise. The burden here is on the plaintiff, but also the long-arm statute can be liberally construed, and as I understand the affidavits and the facts here, Mr. Cloeren has had contacts with Wisconsin as follows: He's had six to eight visits to Wisconsin since the 1997 purchase of Production [3] Components by Cloeren, Inc. That's according to Mr. Cloeren's deposition. Doug Darrow testified in addition to that – I think those visits, by the way, are sufficient, but in addition to that there are approximately four conversations a week with Doug Darrow when Doug Darrow was in Wisconsin, with Mr. Cloeren calling him or vise versa, on topics such as sales, marketing, pending orders, employees, manifold designs for dies, and personal matters. There are approximately two conversations a month with Leigh Darrow; L-e-i-g-h, for the reporter, when Leigh Darrow is in Wisconsin. These are generally regarding sales of Cloeren products. And Mr. Cloeren more particularly was actively involved in the daily operations of Production Components-Cloeren, Inc., which is located in the city of Eau Claire, Chippewa County, Wisconsin.

Looking at these contacts, I think these contacts are sufficient when we have Mr. Cloeren in Wisconsin six to eight times since 1997 for two to four days at a time. These involve working or Production Components-Cloeren, Inc. In addition, as I indicated, there were also frequent phone calls to the business in Wisconsin; four a week on [4]

average with one employee and two a month on average with the second employee.

The nature and quality of the contacts: The contacts are for management of a business which the corporation he owns bought. These are not visits where he simply drives through Wisconsin to change his planes or comes into Wisconsin because he's been sued. They are substantial contacts to oversee Production Components-Cloeren, Inc. The phone calls are frequent and for the same purpose. These phone calls in the electronic age constitute substantial contact with the State of Wisconsin. By themselves, the phone calls aren't enough. I think they reinforce my conclusion that his personal visits are sufficient to give Wisconsin personal jurisdiction. I think the personal visits constitutes substantial contact when he's here for two to four days at a time.

The source of the contacts and their connection with the cause of action: These contacts relate to the purchase of Production Components by Cloeren, Inc. The business is now known – the local business is now known as Production Components-Cloeren, Inc. The cause of action relates to an allegation here that Mr. [5] Cloeren failed to pay the balance on a promissory note payable to Mr. Druschel that was used to pay for stock held by Mr. Druschel in Production Components.

The State of Wisconsin has an interest here seeing that its citizens are able to obtain relief in Wisconsin's courts. Mr. Druschel is a resident of Chippewa County, Wisconsin.

As far as convenience of the parties is concerned, Mr. Druschel, as I said, lives in Chippewa County, Mr. Cloeren lives in Orange, Texas. However, he commenced a lawsuit

against several individuals in Wisconsin, including this plaintiff. I think it was in 2001, if my memory is correct. I wrote down 1991 in my notes here and that's clearly incorrect because the sale didn't take place till 1997.

The issue presented here is not complicated. The only issue is did Mr. Cloeren pay the balance alleged due on a promissory note. It is unlikely that there will be much discovery more than a few witnesses, so I conclude that Wisconsin is not an inconvenient forum for Mr. Cloeren under these circumstances.

The next question the court has to be [6] answered is does the exercise of jurisdiction comport with due process requirements. First of all, I find that Mr. Cloeren has enough minimum contacts with Wisconsin so that maintenance of this suit does not offend traditional notions that fair play is substantial justice. I've gone through that basically looking at the long-arm statute.

In addition, I think personal jurisdiction is reasonable. Wisconsin has a great interest in having the case adjudicated here. The plaintiff's interest in obtaining convenient and effective relief is also great. The burden on the defendant, as I indicated before, is not significant. There are few witnesses. It would not be difficult for him to present his case here in the State of Wisconsin. I would imagine most of this because it involves a debt of hundreds of thousands of dollars would rely on documentation, if he has such, to show that he actually made the payments.

The intrastate judicial system's interest in obtaining the most efficient resolution of the controversy I think is great. And I also find that the shared interest of the several states in [7] furthering fundamental and substantive

social policies such as is relevant here is not impeded by keeping the action in Wisconsin.

So I'm going to find that the motion to dismiss should be denied and deny it.

We need to do some scheduling then. What do you want me to schedule?

MR. SULLIVAN: Are you talking to me, Judge?

THE COURT: Either one of you.

MR. CRAY: Perhaps, Dennis, should we just schedule a scheduling conference in the near future?

THE COURT: We can do a scheduling conference now since we have both parties on the phone. One here, one on the phone. If there are no fact issues, a summary judgment might be appropriate to either grant or deny the plaintiff's claim. If Mr. Druschel shows no payments and that's not disputed, it goes one way. If Mr. Cloeren shows he's made the payments, it goes the other way, or with fact issues, the case would be set for trial.

MR. CRAY: That would be fine, Your Honor.

[8] THE COURT: I don't know. What do you want to do, Mr. Sullivan?

MR. SULLIVAN: Well, I think we should – I mean, I guess we should probably set the matter for trial and if Steve wants to move for summary judgment, you know, he can do that. We'll address that and proceed from there. I guess I'm not really sure.

THE COURT: Would it be a bench trial or jury trial? You haven't filed an answer yet, by the way.

MR. SULLIVAN: I know.

THE COURT: We better wait on a scheduling conference until your answer is filed, now that I think about it. That may make some difference in how we approach this.

MR. SULLIVAN: Okay.

THE COURT: Okay? How soon do you have to have your answer in, now that I've ruled on this?

MR. SULLIVAN: You know, I'm not really sure if it's the same 45 days or if there's some other time period that applies.

MR. CRAY: Dennis, this is Steve Cray. I think it's a shorter time period. I've though [9] of it as a bit of a booby trap.

MR. SULLIVAN: Okay.

MR. CRAY: I can't cite you the statute, but I would suggest that you look at it because I think it might be the 20 day.

THE COURT: Let me look at the statute book, which I happen to have with me.

MR. SULLIVAN: That's always dangerous.

THE COURT: Let's go off the record a second.

(Whereupon, a discussion was held off the record).

THE COURT: We've had a discussion off the record about time limits. We found Section 802.06. The limit is ten days unless the Court fixes a different time. I'm going to allow Mr. Sullivan 20 days, partly because

he's on vacation next week. That takes us out to I think the 17th or 18th. 17th of March. So the answer is due by March 17 and I'll set this for a scheduling conference the next week. How is Thursday the 24th by phone, 8:15 in the morning? Would that work?

MR. SULLIVAN: I'm sorry. The date, again?

[10] THE COURT: 24th in the morning by phone at 8:15.

MR. SULLIVAN: The 24th of March?

THE COURT: Yes.

MR. CRAY: That works for me.

MR. SULLIVAN: That works for me.

THE COURT: Okay. Anything else?

MR. CRAY: I have nothing further at this time, Your Honor.

THE COURT: Anything else, Mr. Sullivan?

MR. SULLIVAN: Nothing further, Your Honor.

THE COURT: That's all. Thank you.

(Hearing concluded).

[11] STATE OF WISCONSIN)
) ss.
EAU CLAIRE COUNTY)

I, DORIS R. PFEIFFER, do hereby certify that as the duly-appointed shorthand reporter, I took in shorthand the proceedings had in the above-entitled matter on the

25th day of February, 2005, and that the attached is a true and correct transcription of the proceedings so taken.

Dated at Eau Claire, Wisconsin, this 7th day of March, 2005.

/s/ Doris R. Pfeiffer
Registered Professional Reporter
Notary Public, State of Wisconsin

My commission expires July 27, 2008.

OFFICE OF THE CLERK

SUPREME COURT OF WISCONSIN
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
[SEAL] MADISON, WI 53701-1688

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October 10, 2006

To:

Hon. Roderick A. Cameron
Circuit Court Judge
Chippewa County
Courthouse
711 N. Bridge Street
Chippewa Falls, WI 54729

Steven R. Cray
Amy L. Vaudreuil
Wiley Law, s.c.
P.O. Box 370
Chippewa Falls, WI 54729-0370

Karen Hepfler
Clerk of Circuit Court
Chippewa County
Courthouse
711 N. Bridge Street
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David J. Sisson
Daniel Kelly
Troy Martell
Deborah Phillips
Reinhart Boerner Van Deuren
S.C.
P.O. Box 2965
Milwaukee, WI 53201-2965

You are hereby notified that the Court has entered the following order:

No. 2005AP2575 *Druschel v. Cloeren* L.C.#2003CV359

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Peter F. Cloeren, and considered by this court;

IT IS ORDERED that the petition for review is denied, with $50 costs.

Cornelia G. Clark
Clerk of Supreme Court

STATE OF WISCONSIN	CIRCUIT COURT	CHIPPEWA COUNTY

ROBERT L. DRUSCHEL
3538 Chippewa River Drive
Eau Claire, Wisconsin 54703

Plaintiff,

vs.

PETER F. CLOEREN
3410 Interstate 10 West
Orange, Texas 77630

Defendant.

COMPLAINT

CASE NO. 03 CV ___

Case Code: 30301

NOW COMES the Plaintiff, Robert L. Druschel, by his attorney, Steven R. Cray, of the law firm, Wiley, Colbert, Norseng, Cray, Herrell & Flory, S.C., and, as in for a Complaint and cause of action against the Defendant alleges as follows:

1. The Plaintiff, Robert L. Druschel, is an adult resident of the State of Wisconsin, with an address of 3538 Chippewa River Drive, Eau Claire, Chippewa County, Wisconsin 54703.

2. The Defendant, Peter F. Cloeren, is believed by the Plaintiff to be an adult resident of the State of Texas, with an address of 3410 Interstate 10 West, Orange, Orange County, Texas 77630.

3. On September 15, 1997, in Eau Claire, Wisconsin, the Defendant signed a Secured Promissory Note whereunder the Defendant promised to pay the Plaintiff at his residence located in Chippewa County, Wisconsin the sum of $2,121,841.00 pursuant to the terms of the Secured Promissory Note, a

copy of which is attached hereto and incorporated herein as Exhibit "A".

4. The consideration for this Promissory Note was the sale by the Plaintiff of his equity shares in the corporation known as Chippewa Valley Die, Inc. Chippewa Valley Die, Inc., was a Wisconsin Corporation with its property and facilities located in Chippewa County, Wisconsin.

5. On February 26, 1998, the Defendant signed a Replacement Secured Promissory Note to replace the original Secured Promissory Note dated September 15, 1997. A copy of the Replacement Secured Promissory Note is attached hereto and incorporated herein as Exhibit "B".

6. Under the terms and conditions of the Notes described above, the Defendant signed a Security Agreement-Pledge and Escrow Agreement granting the Plaintiff security interest in 2200 shares of Class B preferred stock of The Cloeren Company. A copy of the Security Agreement-Pledge and Escrow Agreement is attached to this Complaint as Exhibit "C".

7. Under the terms and conditions of the Replacement Secured Promissory Note, the Plaintiff had the option to declare the entire unpaid principal balance and unpaid accrued interest due and payable on September 1, 2003 by giving the maker written notice of the exercise of this contractual right on or before July 1, 2003.

8. On June 19, 2003, the Plaintiff sent to the Defendant, Peter F. Cloeren, and to Paul Peveto of Cloeren, Inc. notice of the Plaintiff's option to declare the entire balance and unpaid accrued interest due and payable on September 1, 2003. A copy of those letters is attached hereto and incorporated herein as Exhibit "D".

9. The Defendant failed to pay on or before September 1, 2003 the sums due under the terms and conditions of the Replacement Secured Promissory Note.

10. More than ten (10) days have passed since September 1, 2003 and the Defendant has failed to make the required payment under the terms of the Replacement Secured Promissory Note.

11. As a result of the default of the Defendant on the Replacement Secured Promissory Note, the Defendant owes to the Plaintiff the sum of $1,417,063.95 principal, $92,109.16 accrued interest as of September 1, 2003, and interest at the rate of six and one-half percent (6.5%) per annum from September 1, 2003.

THEREFORE, Plaintiff prays for judgment as follows:

A. For judgment in favor of the Plaintiff and against the Defendant in the sum of $1,509,173.11 together with interest from September 1, 2003 until the date of the judgment at the rate of six and one-half percent (6.5%) per annum;

B. For the Plaintiff's costs and disbursements, including collection fees and including a reasonable amount of attorney's fees as allowed under the terms of the Replacement Secured Promissory Note and as allowed by law;

C. For a determination that the Plaintiff has a right to possess the above collateral and to disburse the same pursuant to the Uniform Commercial Code; and

D. For such other and further relief as the Court deems equitable.

Dated this 17th day of September, 2003.

WILEY, COLBERT, NORSENG,
CRAY, HERRELL, & FLORY S.C.

By: /s/ Steven R. Cray
Steven R. Cray
State Bar #1017122
Attorney for Plaintiff,
Robert L. Druschel

ADDRESS:
119½ North Bridge Street
P.O. Box 370
Chippewa Falls, WI 54729
(715) 723-8591

STATE OF WISCONSIN CHIPPEWA COUNTY
CIRCUIT COURT
BRANCH I

ROBERT L. DRUSCHEL

Plaintiff,

v. Case No.: 03-CV-359

PETER F. CLOEREN

Defendant.

ANSWER, MOTION TO DISMISS AND AFFIRMATIVE DEFENSE

(Filed Mar. 17, 2005)

The defendant, Peter F. Cloeren, by his attorneys, Herrick & Hart, S.C., as and for his answer to the plaintiff's complaint alleges as follows:

1. Admit the allegations contained in paragraph 1.

2. Admit the allegations contained in paragraph 2.

3. Admit the allegations contained in paragraph 3 except affirmatively allege that the promissory note attached to the complaint as exhibit A was superceded by the note attached to the complaint as exhibit B.

4. Deny the allegations contained in paragraph 4, and particularly deny that the defendant received any consideration in exchange for the obligations described in the notes attached as exhibits to the plaintiff's complaint.

5. Admit the allegations contained in paragraph 5.

6. The allegations contained in paragraph 6 are legal conclusions which require no response, however, those legal conclusions are denied.

7. The allegations contained in paragraph 7 are legal conclusions which require no response, however, those legal conclusions are denied.

8. Deny the allegations contained in paragraph 8.

9. Admit that the defendant has not paid the sum described in paragraph 9 but affirmatively allege that the plaintiff is not entitled to any such payment and that all additional payments have been properly withheld because the plaintiff breached his obligations, warranties and covenants contained in his employment agreement and stock sale agreement.

10. Admit the allegations contained in paragraph 10 but affirmatively allege that the plaintiff is not entitled to any such payment and that all additional payments have been properly withheld because the plaintiff breached his obligations, warranties and covenants contained in his employment agreement and stock sale agreement.

11. Deny the allegations contained in paragraph 11.

MOTIONS TO DISMISS

12. Defendant moves to dismiss the plaintiff's complaint, pursuant to §802.06(2)(a)3., on the grounds that the court lacks personal jurisdiction over the defendant.

13. Defendant moves to dismiss the plaintiff's complaint on the grounds that an action is pending between these parties in the District Court of Orange County, Texas (Cause No. B-031037-C), which was filed prior to the commencement of this action and that this court, respecting principles of comity, must defer to

the proceedings pending in the Texas court. (Exhibit 1).

AFFIRMATIVE DEFENSES

14. This court lacks personal jurisdiction over the defendant.

15. The plaintiff breached the duties, obligations, warranties and covenants contained in his employment agreement entitling the defendant to withhold further payment to the plaintiff under the promissory notes.

WHEREFORE, the defendant demands judgment dismissing the plaintiff's complaint together with his costs and disbursements.

Dated this 16th day of March, 2005.

HERRICK & HART, S.C.

By: /s/ Dennis M. Sullivan
Dennis M. Sullivan
State Bar No. 1016053
Attorneys for Peter Cloeren

Post Office Address:
116 West Grand Avenue
Post Office Box 167
Eau Claire, Wisconsin 54702-0167
(715) 832-3491

I Certify That on March 16, 2005
I Served the Within Document on
Counsel of Record, by Mail,
Pursuant to Wis. Stats. 801.14(2)

/s/ [Illegible]
HERRICK & HART, S.C.

EXHIBIT 1

CAUSE NO. B031037-C

CLOEREN, INCORPORATED f/k/a THE CLOEREN COMPANY, PETER CLOEREN, PRODUCTION COMPONENTS-CLOEREN, INC. f/k/a PRODUCTION COMPONENTS/CHIPPEWA VALLEY DIE, INC.	§	**IN THE DISTRICT COURT OF**
Plaintiffs,	§	**ORANGE COUNTY, TEXAS**
V.	§	
ROBERT L. DRUSCHEL,	§	**163 JUDICIAL DISTRICT**
Defendant.	§	

PLAINTIFFS' ORIGINAL PETITION

(Filed Aug. 28, 2003)

Plaintiffs Cloeren Incorporated f/k/a The Cloeren Company ("Cloeren, Inc."), Peter Cloeren and Production Components-Cloeren, Inc. f/k/a Production Components/ Chippewa Valley Die, Inc. ("Production Components") files this their Original Petition and would respectfully show the Court the following:

1.
Parties.

Plaintiff Cloeren Inc. is a Texas corporation with its principal place of business in Orange County, Texas. Plaintiff Peter Cloeren is an individual residing in Orange County, Texas. Plaintiff Production Components-Cloeren, Inc. f/k/a Production Components/Chippewa Valley Die,

Inc. ("Production Components") is a Wisconsin corporation with its principal place of business in Eau Claire, Wisconsin. Defendant Robert L. Druschel ("Druschel") is an individual residing in Eau Claire, Wisconsin. Druschel is a nonresident who has engaged in business in Texas but does not maintain a regular place of business in Texas nor a designated agent for service of process. Accordingly, pursuant to Tex. Civ. Prac. & Rem. Code § 17.044, the Texas Secretary of State is Druschel's agent for service of process. Druschel's last known address is 3538 Chippewa River Drive, Eau Claire, Wisconsin 54703.

2.
Jurisdiction and Venue.

This court has personal jurisdiction over Druschel pursuant to Tex. Civ. Prac. & Rem. Code § 17.042 since Druschel entered into contracts with Texas residents (Cloeren Inc. and Peter Cloeren) and the Texas residents were required to perform the contracts in whole or in part in Texas. Druschel has sufficient minimum contacts with Texas such that the maintenance of personal jurisdiction over him in this case does not violate due process. Venue is proper in Orange County, Texas pursuant to Tex. Civ. Prac. & Rem. Code § 15.002 since: (1) Plaintiff Cloeren Inc's principal office is in Orange County, Texas and Plaintiff Peter Cloeren is a resident of Orange County, Texas; and (3) Druschel is a Texas nonresident.

3.
Facts.

On September 15, 1997 Cloeren Inc. and Druschel entered into a series of contracts related to Cloeren Inc.'s

acquisition of all of the outstanding shares in Production Components. These contracts include: (1) a Stock Purchase Agreement; (2) an Employment Contract; (3) an Agreement-Not-To Compete; (4) A Security Agreement-Pledge and Escrow Agreement; and (5) a Secured Promissory Note. Production Components was an ongoing business and Druschel was one of the shareholders who oversaw Production Components' design, manufacture and sale of slot coating dies. Druschel was paid $3,200,000.00 for his shares in Production Components through a cash payment of $1,000,000.00 and a Promissory Note for $2,200,000.00 entered into between Peter Cloeren (the principal shareholder in Cloeren Inc.) and Druschel that is secured with certain stock in Cloeren Inc. owned by Peter Cloeren. The secured stock was placed in escrow with Mauriceville National Bank (now known as Orange Savings Bank) pursuant to a Security Agreement-Pledge and Escrow Agreement.

4.

One of the main purposes behind these interlocking agreements was to facilitate Cloeren Inc.'s acquisition of this ongoing business in a manner that ensured that the former shareholders like Druschel would become employees of the new Cloeren entity who were contractually bound not to set up a competing business after the acquisition. In other words Cloeren Inc. wanted to "get what it was paying for" and did not want to pay the former shareholders like Druschel in excess of $3.2 million dollars and watch them set up shop down the street and steal from Cloeren, Inc. the business it was acquiring. Unfortunately, Druschel has completely disregarded his contractual

obligations and has either directly or indirectly begun competing with Cloeren Inc.

5.

After the close of the acquisition Druschel maintained the same responsibilities he had before the acquisition, which was overseeing the design, manufacture and sale of precision slot coating dies. The Agreement-Not-To-Compete signed by Druschel specifically states that:

> [Druschel] agrees that for a term of five (5) years from the date of this Agreement, such period not to include any period of violation hereof or period to enforce the covenants herein . . . [Druschel will not:
>
> (a) Directly or indirectly, alone or for the account of [Druschel], or as a partner, member, employee, advisor, or agent of any partnership or joint venture, or as a trustee, officer, director, shareholder, employee, advisor, or agent of any corporation, trust or other business organization or entity, or as a consultant working for any of the foregoing, own, manage, encourage, support, finance, operate, join, control or participate in the ownership, management, operation of or control of, any business which develops, designs, manufactures, sells, or refurbishes extrusion dies anywhere in the world (a "business in competition with the Corporation");
>
> (b) Cause, induce or assist anyone in causing or inducing in any way any employee of Corporation or any of its affiliates to resign or

> sever his employment or to breach an employment agreement with Corporation or any of its affiliates;

The Employment Agreement signed by Druschel specifically states that:

> [Druschel] agrees that during the term of his employment hereunder and for a period of two (2) years after his employment hereunder terminates for any reason, he will not:
>
> (a) Directly or indirectly, alone or for the account of [Druschel], or as a partner, member, employee, advisor, or agent of any partnership or joint venture, or as a trustee, officer, director, shareholder, employee, advisor, or agent of any corporation, trust or other business organization or entity, or as a consultant working for any of the foregoing, provide services of a nature similar to those provided by [Druschel] to Employer while employed hereunder to any business in competition with Employer;
>
> (b) Directly or indirectly induce or attempt to induce any supplier or customer of Employer or Cloeren at the end of this term of this Agreement to terminate any agreements with Employer or Cloeren or disrupt any relationship with such supplier or customer; or
>
> (c) Directly or indirectly cause, induce, or assist anyone in causing or inducing in any way any employee of Employer or Cloeren or any of their affiliates to resign or sever employment or to breach an employment agreement with Employer, Cloeren or any affiliate.

Druschel resigned from Production Components on August 28, 2001; therefore his obligations under the Employment Agreement extend until August 28, 2003. The Agreement-Not-To-Compete was signed on September 15, 1997. The five-year term, therefore, ended on September 15, 2002.[1] Druschel violated his contractual non-compete obligations during the periods in which they were in effect. Druschel's violations include, but are not limited to: (1) acting as an "advisor" to a competing business; (2) acting as an "agent" to a competing business; (3) inducing employees of Production Components to sever their employment relationship or breach their employment agreements with Production Components; and (4) such other acts that are revealed in discovery in this matter.

6.
Plaintiffs' First Cause of Action – Breach of Contract.

Druschel has breached the Employment Agreement and the Agreement-Not-To-Compete as alleged above. Plaintiffs are either signatories to these agreements or third party beneficiaries to these agreements. Druschel's breaches have proximately caused damages to Plaintiffs in an amount in excess of the jurisdictional limits of the Court.

---

[1] However, as alleged *infra*, during the five-year period Druschel violated the agreement. Therefore, the Agreement-Not-To-Compete has been extended for the period of non-compliance.

7.
Contractual Set-Off.

The Stock Purchase Agreement specifically provides that Druschel will indemnify and save and hold Cloeren Inc. and Production Components harmless from and against any cost, expense or damage resulting from Druschel's failure to perform or observe any term, provision, covenant, agreement or condition in the Stock Purchase Agreement or the other interlocking agreements, including, but not limited to the Employment Agreement and the Agreement-Not-To-Compete. Plaintiffs are, therefore, legally entitled to set-off any remaining obligations they may have to Druschel under the Promissory Note against this contractually agreed upon indemnity provision.

8.
Failure of Consideration and Declaratory Judgment.

As previously stated, all of the agreements signed commensurate with Cloeren Inc.'s acquisition of Production Components are interlocking agreements. Druschel's breach of his obligations not to compete constitutes a loss of the benefit of the bargain and failure of consideration to Cloeren Inc. in this transaction. Accordingly, Cloeren Inc. and Peter Cloeren seek a declaratory judgment that they are entitled to suspend payments under the Promissory Note to Druschel as a result of this loss of the benefit of the bargain and failure of consideration.

9.

Plaintiffs are entitled to recover their reasonable and necessary attorneys' fees expended in prosecuting this claim of breach of contract pursuant to Tex. Civ. Prac. & Rem. Code § 38.001

10.
Plaintiffs' Second Cause of Action – Business Disparagement.

Druschel has made false statements concerning Plaintiffs to third parties about Plaintiffs' economic interests. On information and belief, Druschel has stated to third parties that Plaintiffs were not paying their bills and would shortly be bankrupt. Druschel made these false statements with malice and without any legal privilege. Accordingly, Druschel has committed the tort of business disparagement, which has proximately caused Plaintiffs' damages in an amount in excess of the jurisdictional limits of the Court.

WHEREFORE, Plaintiffs pray that citation be issued to Defendant and that upon final trial hereof Plaintiffs be awarded their damages, pre-judgment interest, post-judgment interest, costs, attorneys' fees and all other relief both legal and equitable to which Plaintiffs are justly entitled.

Respectfully submitted,

SHELDON, JORDAN & DUNHAM, L.L.P.

By: /s/ Kevin M. Jordan

Kevin M. Jordan
State Bar No. 11014800
Eric Paul Edwardson
State Bar No. 24002042
905 Orleans @ College
Beaumont, Texas 77701
(409) 835-3322 (Telephone)
(409) 835-3838 (Telecopy)

ATTORNEYS FOR PLAINTIFFS

JURY DEMAND

Plaintiffs hereby demand trial by jury.

STATE OF WISCONSIN	CIRCUIT COURT	CHIPPEWA COUNTY

ROBERT L. DRUSCHEL
3538 Chippewa River Drive
Eau Claire, Wisconsin 54703

Plaintiff,

vs.

CASE NO. 03 CV 359

Case Code: 30301

PETER F. CLOEREN
3410 Interstate 10 West
Orange, Texas 77630

Defendant.

AFFIDAVIT OF ROBERT L. DRUSCHEL IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN)
) ss.
COUNTY OF CHIPPEWA)

Robert L. Druschel, after first being duly sworn, on oath, states the following as true and accurate:

1. Your Affiant is an adult resident of Chippewa County, Wisconsin.

2. Your Affiant is the Plaintiff in this Chippewa County legal action.

3. In September of 1997, your Affiant, as a then shareholder of the Wisconsin corporation known as Production Components/Chippewa Valley Die, Inc. was involved in the sale of the stock of that corporation to The Cloeren

Company, a Texas corporation, whose president and majority shareholder was Defendant Peter F. Cloeren.

4. In consideration for the sale of the stock owned by your Affiant in Production Components/Chippewa Valley Die, Inc. to the Cloeren Company, Defendant Peter F. Cloeren signed a Secured Promissory Note in the sum of $2,200,000. A true and accurate copy of said Secured Promissory Note is attached to this Affidavit as Exhibit No. 1.

5. Peter F. Cloeren also signed a Security Agreement-Pledge and Escrow Agreement also dated September 15, 1997. Attached hereto and incorporated herein as Exhibit No. 2 is a true and accurate copy of said Agreement.

6. Attached hereto and incorporated herein as Exhibit No. 3 is a true and accurate copy of the Stock Purchase Agreement dated September 15, 1997 and signed by Production Components/Chippewa Valley Die, Inc. and The Cloeren Company. Your Affiant signed the Stock Purchase Agreement dated September 15, 1997 as one of the stockholders of Production Components/Chippewa Valley Die, Inc.

7. Attached hereto and incorporated herein as Exhibit No. 4 is a true and accurate copy of your Affiant's Employment Contract with Production Components/Chippewa Valley Die, Inc. dated September 15, 1997.

8. The closing date of the Stock Purchase Agreement dated September 15, 1997 was September 15, 1997.

9. At no time since September 15, 1997, your Affiant has ever received a notice of Indemnified Loss pursuant to

the terms of Section 11.2 of the Stock Purchase Agreement dated September 15, 1997.

10. If Defendant Peter F. Cloeren had not signed and delivered the Secured Promissory Note, your Affiant would not have agreed to or signed the Stock Purchase Agreement of September 15, 1997, the Employment Contract of September 15, 1997, and your Affiant would not have transferred the stock your Affiant owned to The Cloeren Company.

11. Shortly after the stock transfer, Production Components/Chippewa Valley Die, Inc. changed its name to Production Components-Cloeren, Inc.

12. On or about February 26, 1998, Defendant Peter F. Cloeren signed and delivered to your Affiant a Replacement Secured Promissory Note. A true and accurate copy of said Replacement Secured Promissory Note is attached to this Affidavit as Exhibit No. 5.

13. In September of 1997, your Affiant received from Defendant Peter F. Cloeren the sum of $1,000,000 as partial payment of the Replacement Secured Promissory Note.

14. In April of 1998, your Affiant received from Defendant Peter F. Cloeren the sum of $342,164.10 as partial payment of the Replacement Secured Promissory Note.

15. In September of 1999, your Affiant received from Defendant Peter F. Cloeren the sum of $342,184.10 as partial payment on the Replacement Secured Promissory Note.

16. In September of 2000, your Affiant received from Defendant Peter F. Cloeren the sum of $192,184.10 as partial payment on the Replacement Secured Promissory Note.

17. In September of 2001, your Affiant received from Defendant Peter F. Cloeren the sum of $192,184.10 as partial payment of the Replacement Secured Promissory Note.

18. In September of 2002, your Affiant received from Defendant Peter F. Cloeren the sum of $192,184.10 as partial payment on the Replacement Secured Promissory Note.

19. In September of 2001, your Affiant was named a defendant in a lawsuit commenced by Production Components-Cloeren, Inc. A copy of the Amended Complaint is attached hereto and incorporated herein as Exhibit No. 6.

20. On December 10, 2001, Judge Roderick A. Cameron granted an order for judgment in favor of your Affiant and against Production Components-Cloeren, Inc. in the lawsuit. A copy of the memorandum and Order for Judgment is attached hereto and incorporated herein as Exhibit No. 7.

21. On July 30, 2002, the Court of Appeals affirmed Judge Cameron's ruling in favor of your Affiant. A copy of the Appellate Court decision is attached hereto and incorporated herein as Exhibit No. 8.

22. Your Affiant, on June 19, 2003, sent notification to Defendant Peter F. Cloeren and to Paul Peveto of his exercise of the option contained in the Replacement Secured Promissory Note to declare the entire unpaid balance, together with accrued interest, due and payable

on September 1, 2003. A true and accurate copy of said Notice is attached to this Affidavit as Exhibit No. 9.

23. Defendant Peter F. Cloeren failed to pay the total amount due and payable on September 1, 2003 or anytime thereafter the balance of the sums due under the terms and conditions of the Replacement Secured Promissory Note.

24. Since September of 2002, your Affiant has received no payment of any kind from Defendant Peter F. Cloeren on the Replacement Secured Promissory Note.

Dated this 13th day of June, 2005.

/s/ Robert L. Druschel
Robert L. Druschel

Subscribed and sworn to before me
this 13th day of June, 2005.

/s/ Steven R. Cray
Steven R. Cray, Notary Public
Chippewa County, State of Wisconsin
My commission is permanent.

EXHIBIT 1

THIS NOTE HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), OR UNDER ANY STATE SECURITIES OR BLUE SKY LAWS AND NO SUCH REGISTRATION IS CONTEMPLATED. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL. THIS NOTE MAY NOT BE SOLD, TRANSFERRED, ASSIGNED OR OTHERWISE DISPOSED OF UNLESS A REGISTRATION STATEMENT UNDER

THE SECURITIES ACT AND ANY APPLICABLE STATE SECURITIES LAWS WITH RESPECT TO SUCH DISPOSITION IS THEN IN EFFECT OR UNLESS AN EXEMPTION FROM REGISTRATION EXISTS, PRIOR TO ANY ASSIGNMENT, TRANSFER, OR OTHER DISPOSITION OF THIS NOTE PURSUANT TO ANY AVAILABLE EXEMPTION FROM REGISTRATION, THE MAKER OF THIS NOTE MAY REQUIRE THAT THE HOLDER OF THIS NOTE FURNISH IT WITH AN OPINION OF SATISFACTORY TO THE MAKER THAT SUCH SALE, TRANSFER, ASSIGNMENT OR OTHER DISPOSITION IS EXEMPT FROM REGISTRATION UNDER THE SECURITIES ACT AND ALL APPLICABLE STATE SECURITIES LAWS.

SECURED PROMISSORY NOTE

Orange, Texas $2,200,000.00 September 15, 1997

FOR VALUE RECEIVED, the undersigned (hereinafter called "Maker") as principal, promises to pay to the order of Robert L. Druschel (hereinafter called "Payee"), the sum of TWO MILLION TWO HUNDRED THOUSAND AND NO/100 DOLLARS ($2,200,000.00), at the residence of the Payee at 3538 Chippewa River Drive, Eau Claire, Chippewa County, Wisconsin 54703, with interest thereon from date until maturity at the rate of six and one-half percent (6.5%) per annum.

Principal and interest on this note are due and payable in ten (10) installments, in such amounts and on such dates as set forth on the payment schedule attached hereto as Schedule "A" and incorporated herein by reference, and an eleventh and final installment is due and

payable on or before September 1, 2007, also as set forth on the attached payment schedule. Notwithstanding the foregoing, Payee shall have the option to declare the entire unpaid principal balance and unpaid accrued interest due and payable on September 1, 2003 by giving Maker written notice of exercise on or before July 1, 2003; provided that if Payee fails to exercise said option in writing within the period of time stated above, the option shall expire and be no longer of any force or effect.

Interest shall be computed on a per annum basis of a year of three hundred sixty-five (365) days and for the actual number of days (including the first but excluding the last day) elapsed.

It is the intention of Maker and Payee to conform strictly to applicable usury laws. Accordingly, if the transactions contemplated hereby would be usurious under applicable law, then, in that event, notwithstanding anything to the contrary herein or in any agreement entered into in connection with or as security for this note, it is agreed as follows: (i) the aggregate of all consideration which constitutes interest under applicable law that is taken, reserved, contracted for, charged or received under this note or under any of the aforesaid agreements or otherwise in connection with this note shall under no circumstances exceed the maximum amount of interest allowed by applicable law, and any excess shall be credited against the principal of this note by the holder hereof (or, if this note shall have been paid in full, refunded to Maker); and (ii) in the event that the maturity of this note is accelerated by reason of an election by the holder hereof resulting from any default hereunder or otherwise, or in the event of any required or permitted prepayment, then such consideration that constitutes interest may never

include more than the maximum amount allowed by applicable law, and excess interest, if any, provided for in this note or otherwise shall be canceled automatically as of the date of such acceleration or prepayment and, if theretofore paid, shall be credited against the principal of this note (or if this note shall have been paid in full, refunded to Maker). This note shall be construed under and governed by the laws of the State of Texas (including applicable federal law), but in any event Tex. Rev. Civ. Stat. Ann. art. 5069 ch. 15 (which regulates certain revolving loan accounts and revolving triparty accounts) shall not apply to the loan evidenced by this note. Unless changed in accordance with law, the applicable rate ceiling under Texas law shall be indicated (weekly) rate ceiling from time to time in effect as provided in Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, as amended.

If any installment or payment of principal or interest of this note is not paid within ten (10) days of the date when due; or if Maker, The Cloeren Company (or any successor-in-interest), or any drawer, accepter, endorser, guarantor, surety, accommodation party or other person now or hereafter primarily or secondarily liable upon or for payment of all or any part of this note (each hereinafter called an "other liable party") shall die, or become insolvent (however such insolvency may be evidenced); or if any proceeding, procedure or remedy supplementary to or in enforcement of judgment shall be resorted to or commenced against Maker or any other liable party, or with respect to any property of any of them; or if any governmental authority or any court at the instance thereof shall take possession of any substantial part of the property of or assume control over the affairs or operations of, or a receiver shall be appointed for or take possession of

any material portion of the property of, or a writ or order of attachment or garnishment shall be issued or made against any material portion of the property of Maker or any other liable party; or if Maker or any other liable party (if other than a natural person) shall be dissolved, wound up, liquidated or otherwise terminated; or if the ownership of The Cloeren Company is modified in any manner which causes the voting control of Maker, either directly or indirectly, to be reduced below 50%; or if such portion of the stock of The Cloeren Company is sold, transferred, or otherwise disposed of in any manner which causes the voting control of Maker, either directly or indirectly, to be reduced below 50%; or if 50% or more of the ownership interest of Production Components/Chippewa Valley Die, Inc. (or any successor) is no longer directly or indirectly under the voting control of Maker and/or members of his family, individually or through trusts; or if a default occurs under any instrument now or hereafter executed in connection with or as security for this note, including that certain Security Agreement-Pledge and Escrow Agreement, of even date; thereupon, at the option of Payee, this note and any and all other indebtedness of Maker to Payee shall become and be due and payable forthwith without demand, notice of default or of intent to accelerate the maturity hereof, notice of nonpayment, presentment, protest or notice of dishonor, all of which are hereby expressly waived by maker and each other liable party.

If this note, or any installment hereon (whether principal or interest), is not paid at maturity, however such maturity may be brought about, and this note is placed in the hands of an attorney for collection, or suit is filed hereon, or proceedings are had in probate, bankruptcy,

foreclosure, repossession, receivership, reorganization, arrangement or other legal proceedings for collection hereof, Maker agrees to pay Payee its collection costs, including a reasonable amount for attorneys' fees, but in no event to exceed the maximum amount permitted by law, if any. Maker and each other liable party are and shall be directly and primarily, jointly and severally, liable for the payment of all sums called for hereunder, and Maker and each other liable party, hereby expressly waive bringing of suit and diligence in taking any action to collect any sums owing hereon and in the handling of any security, and Maker and each other liable party hereby consent to and agree to remain liable hereon regardless of any renewals, extensions for any period or rearrangements hereof, or partial prepayments hereon, or any release or substitution of security herefor, in whole or in part, with or without notice, from time to time, before or after maturity.

At the option of the Maker, this entire note, or any part hereof, may be paid on or before its maturity date without penalty, provided, however, no payment of any amount of the principal hereof shall affect the obligation of the Maker to continue to pay the installments of interest hereinabove provided on each regular installment due date following such prepayment until this note is paid in full.

The Maker and all sureties, endorsers and guarantors of this note severally waive demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intention to accelerate maturity, notice of acceleration of maturity, and all other notice, filing of suit and diligence in collecting this note or enforcing any of the security therefor, and do hereby agree to any substitution,

exchange or release, in whole or in part, of any security herefor or the release of any party primarily or secondarily liable hereon, and do hereby consent to any and all renewals or extensions from time to time, of this note, or any part hereof, either before or after maturity, all without any notice thereof to any of them and without affecting or releasing the liability of any of them. The sureties, endorsers and guarantors of this note do further agree that it will not be necessary for the holder hereof, in order to enforce payment by them of this note, to first institute suit or exhaust its remedies against Maker or others liable herefor or to enforce its rights against any security therefor.

The proceeds of this note represent credit this day advanced by Payee at the request of and as a loan to Maker, as partial consideration for the purchase by The Cloeren Company from Payee of all of the issued and outstanding stock of Production Components/Chippewa Valley Die, Inc., a Wisconsin corporation owned by Payee, pursuant to the Stock Purchase Agreement of September 15, 1997, between The Cloeren Company and the stockholders of such corporation (the "Agreement"). This Note is subject to all offsets, credits and deductions allowed Maker under the terms of the Agreement, which is incorporated herein by reference.

This note is secured by the security described below, but a failure to describe all or part of the security shall not be considered as a waiver of such security; preferred stock of The Cloeren Company, a Texas corporation, issued in the name of Maker.

This note may not be transferred without the consent of Maker, which consent shall not be unreasonably withheld,

and is subject to a right of offset as provided in the Agreement.

Maturity Date: MAKER:

September 15, 2007

MAKER'S ADDRESS FOR NOTICE:

3410 Interstate 10 West
Orange, Texas 77630

/s/ Peter F. Cloeren
Peter F. Cloeren

EXHIBIT 5

THIS NOTE HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), OR UNDER ANY STATE SECURITIES OR BLUE SKY LAWS AND NO SUCH REGISTRATION IS CONTEMPLATED. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL. THIS NOTE MAY NOT BE SOLD, TRANSFERRED, ASSIGNED OR OTHERWISE DISPOSED OF UNLESS A REGISTRATION STATEMENT UNDER THE SECURITIES ACT AND ANY APPLICABLE STATE SECURITIES LAWS WITH RESPECT TO SUCH DISPOSITION IS THEN IN EFFECT OR UNLESS AN EXEMPTION FROM REGISTRATION EXISTS, PRIOR TO ANY ASSIGNMENT, TRANSFER, OR OTHER DISPOSITION OF THIS NOTE PURSUANT TO ANY AVAILABLE EXEMPTION FROM REGISTRATION, THE MAKER OF THIS NOTE MAY REQUIRE THAT THE HOLDER OF THIS NOTE FURNISH IT WITH AN OPINION OF SATISFACTORY TO THE MAKER THAT SUCH SALE, TRANSFER, ASSIGNMENT OR OTHER DISPOSITION IS EXEMPT FROM REGISTRATION UNDER

THE SECURITIES ACT AND ALL APPLICABLE STATE SECURITIES LAWS.

REPLACEMENT SECURED PROMISSORY NOTE

Orange, Texas $2,121,841.00 February 26, 1998, to be effective September 15, 1997

FOR THE CONSIDERATION received by me upon my execution of that certain Secured Promissory Note dated September 15, 1997 (the "original promissory note"), the undersigned (hereinafter called "Maker") as principal, promises to pay to the order of Robert L. Druschel (hereinafter called "Payee"), the sum of TWO MILLION ONE HUNDRED TWENTY-ONE THOUSAND EIGHT HUNDRED FORTY-ONE AND NO/100 DOLLARS ($2,121,841.00) at the residence of the Payee at 3538 Chippewa River Drive, Eau Claire, Chippewa County, Wisconsin 54703, with interest thereon from date until maturity at the rate of six and one-half percent (6.5%) per annum.

Principal and interest on this note are due and payable in ten (10) installments, in such amounts and on such dates as set forth on the payment schedule attached hereto as Schedule "A" and incorporated herein by reference, and an eleventh and final installment is due and payable on or before September 1, 2007, also as set forth on the attached payment schedule. Notwithstanding the foregoing, Payee shall have the option to declare the entire unpaid principal balance and unpaid accrued interest due and payable on September 1, 2003 by giving Maker written notice of exercise on or before July 1, 2003; provided that if Payee fails to exercise said option in writing within

the period of time stated above, the option shall expire and be no longer of any force or effect.

Interest shall be computed on a per annum basis of a year of three hundred sixty-five (365) days and for the actual number of days (including the first but excluding the last day) elapsed.

It is the intention of Maker and Payee to conform strictly to applicable usury laws. Accordingly, if the transactions contemplated hereby would be usurious under applicable law, then, in that event, notwithstanding anything to the contrary herein or in any agreement entered into in connection with or as security for this note, it is agreed as follows: (i) the aggregate of all consideration which constitutes interest under applicable law that is taken, reserved, contracted for, charged or received under this note or under any of the aforesaid agreements or otherwise in connection with this note shall under no circumstances exceed the maximum amount of interest allowed by applicable law, and any excess shall be credited against the principal of this note by the holder hereof (or, if this note shall have been paid in full, refunded to Maker); and (ii) in the event that the maturity of this note is accelerated by reason of an election by the holder hereof resulting from any default hereunder or otherwise, or in the event of any required or permitted prepayment, then such consideration that constitutes interest may never include more than the maximum amount allowed by applicable law, and excess interest, if any, provided for in this note or otherwise shall be canceled automatically as of the date of such acceleration or prepayment and, if theretofore paid, shall be credited against the principal of this note (or if this note shall have been paid in full, refunded to Maker). This note shall be construed under

and governed by the laws of the State of Texas (including applicable federal law), but in any event Tex. Rev. Civ. Stat. Ann. art. 5069 ch. 15 (which regulates certain revolving loan accounts and revolving triparty accounts) shall not apply to the loan evidenced by this note. Unless changed in accordance with law, the appliable rate ceiling under Texas law shall be indicated (weekly) rate ceiling from time to time in effect as provided in Tex. Rev. Civ. Stat. Ann. art. 5069-1.04, as amended.

If any installment or payment of principal or interest of this note is not paid within ten (10) days of the date when due; or if Maker, Cloeren Incorporated (formerly The Cloeren Company) (or any successor-in-interest), or any drawer, accepter, endorser, guarantor, surety, accommodation party or other person now or hereafter primarily or secondarily liable upon or for payment of all or any part of this note (each hereinafter called an "other liable party") shall die, or become insolvent (however such insolvency may be evidenced); or if any proceeding, procedure or remedy supplementary to or in enforcement of judgment shall be resorted to or commenced against maker or any other liable party, or with respect to any property of any of them; or if any governmental authority or any court at the instance thereof shall take possession of any substantial part of the property of or assume control over the affairs or operations of, or a receiver shall be appointed for or take possession of any material portion of the property of, or a writ or order of attachment or garnishment shall be issued or made against any material portion of the property of Maker or any other liable party; or if Maker or any other liable party (if other than a natural person) shall be dissolved, wound up, liquidated or otherwise terminated; or if the ownership of Cloeren Incorporated is modified in

any manner which causes the voting control of Maker, either directly or indirectly, to be reduced below 50%; or if such portion of the stock of Cloeren Incorporated is sold, transferred, or otherwise disposed of in any manner which causes the voting control of Maker, either directly or indirectly, to be reduced below 50%; or if 50% or more of the ownership interest of Production Components/Chippewa Valley Die, Inc. (or any successor) is no longer directly or indirectly under the voting control of Maker and/or members of his family, individually or through trusts; or if a default occurs under any instrument now or hereafter executed in connection with or as security for this note, including that certain Security Agreement-Pledge and Escrow Agreement, of even date; thereupon, at the option of Payee, this note and any and all other indebtedness of Maker to Payee shall become and be due and payable forthwith without demand, notice of default or of intent to accelerate the maturity hereof, notice of nonpayment, presentment, protest or notice of dishonor, all of which are hereby expressly waived by maker and each other liable party.

If this note, or any installment hereon (whether principal or interest), is not paid at maturity, however such maturity may be brought about, and this note is placed in the hands of an attorney for collection, or suit is filed hereon, or proceedings are had in probate, bankruptcy, foreclosure, repossession, receivership, reorganization, arrangement or other legal proceedings for collection hereof, Maker agrees to pay Payee its collection costs, including a reasonable amount for attorneys' fees, but in no event to exceed the maximum amount permitted by law, if any. Maker and each other liable party are and shall be directly and primarily, jointly and severally, liable

for the payment of all sums called for hereunder, and Maker and each other liable party, hereby expressly waive bringing of suit and diligence in taking any action to collect any sums owing hereon and in the handling of any security, and Maker and each other liable party hereby consent to and agree to remain liable hereon regardless of any renewals, extensions for any period or rearrangements hereof, or partial prepayments hereon, or any release or substitution of security herefor, in whole or in part, with or without notice, from time to time, before or after maturity.

At the option of the Maker, this entire note, or any part hereof, may be paid on or before its maturity date without penalty, provided, however, no payment of any amount of the principal hereof shall affect the obligation of the Maker to continue to pay the installments of interest hereinabove provided on each regular installment due date following such prepayment until this note is paid in full.

The Maker and all sureties, endorsers and guarantors of this note severally waive demand, presentment for payment, notice of nonpayment, protest, notice of protest; notice of intention to accelerate maturity, notice of acceleration of maturity, and all other notice, filing of suit and diligence in collecting this note or enforcing any of the security therefor, and do hereby agree to any substitution, exchange or release, in whole or in part, of any security herefor or the release of any party primarily or secondarily liable hereon, and do hereby consent to any and all renewals or extensions from time to time, of this note, or any part hereof, either before or after maturity, all without any notice thereof to any of them and without affecting or releasing the liability of any of them. The sureties,

endorsers and guarantors of this note do further agree that it will not be necessary for the holder hereof, in order to enforce payment by them of this note, to first institute suit or exhaust its remedies against Maker or others liable herefor or to enforce its rights against any security therefor.

This note is made to replace that certain original promissory note executed by Maker, Peter F. Cloeren, dated September 15, 1997 in the original principal amount of $2,200,000.00, the proceeds of which represented a credit advanced by Payee, Robert L. Druschel, at the request of and as a loan to Maker, as partial consideration for the purchase by The Cloeren Company (now known as Cloeren Incorporated) from Payee of all of the issued and outstanding stock of Production Components/Chippewa Valley Die, Inc., a Wisconsin corporation owned by Payee, pursuant to the Stock Purchase Agreement of September 15, 1997, between The Cloeren Company (now known as Cloeren Incorporated) and the stockholders of such corporation (the "Agreement"). The original promissory note was expressly made subject to all offsets, credits and deductions allowed Maker under the terms of the Agreement, and an adjustment to the original promissory note of a principal reduction of $78,159.00 was agreed upon by Payee pursuant to Section 2.2 of the Agreement, as the Stockholders' Equity on the closing date statement that was prepared subsequent to the original promissory note is less than the Base Equity required in the Agreement. This Replacement Secured Promissory Note now made is being executed for the consideration described above to replace and supersede the original promissory note. This Replacement Secured Promissory Note is effective as of the date of the original promissory note, and except as

otherwise specifically provided herein, Maker reaffirms and ratifies all of the terms and provisions of said original promissory note as restated by this replacement instrument. Maker stipulates that any reference made to the original $2,200,000 note in any other documents executed simultaneously with or as security for such original note shall be deemed to include this Replacement Secured Promissory Note.

This note is secured by the security described below, but a failure to describe all or part of the security shall not be considered as a waiver of such security: preferred stock of Cloeren Incorporated, formerly known as The Cloeren Company, a Texas corporation, issued in the name of Maker.

This note may not be transferred without the consent of Maker, which consent shall not be unreasonably withheld, and is subject to a right of offset as provided in the Agreement.

Maturity Date: MAKER:

September 1, 2007

MAKER'S ADDRESS FOR NOTICE:

3410 Interstate 10 West
Orange, Texas 77630

/s/ Peter F. Cloeren
Peter F. Cloeren

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 1	CHIPPEWA COUNTY

ROBERT L. DRUSCHEL

Plaintiff,

v. Case No.: 03-CV-359

PETER F. CLOEREN

Defendant.

AFFIDAVIT OF DENNIS M. SULLIVAN

(Filed Jun. 15, 2005)

STATE OF WISCONSIN)
) ss
Eau Claire County)

Dennis M. Sullivan, being first duly sworn on oath, deposes and states as follows:

1. I am the attorney for the defendant, Peter Cloeren, for the above-referenced matter.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Stock Purchase Agreement of September 15, 1997.

3. Attached hereto as Exhibit 2 is a true and correct copy of the Secured Promissory Note of September 15, 1997.

4. Attached hereto as Exhibit 3 is a true and correct copy of the Replacement Secured Promissory Note of February 26, 1998.

5. Attached hereto as Exhibit 4 is a true and correct copy of Robert L. Druschel's Employment Contract.

6. Attached hereto as Exhibit 5 is a true and correct copy of the Agreement Not To Compete.

7. Attached hereto as Exhibit 6 is a copy of Exhibit 4 to the deposition of Steve Jonjak of May 22, 2001.

8. Attached hereto as Exhibit 7 is the deposition of Robert Druschel of January 10, 2005 in Texas Case No. A-031037-C.

9. Attached hereto as Exhibit 8 is the deposition of Robert Shakal of June 7, 2001 in Case No. 01 CV 80.

10. Attached hereto as Exhibit 9 is the deposition of Steve Jonjak of May 22, 2001 in Case No. 01 CV 80.

11. Attached hereto as Exhibit 10 is the deposition of Steve Jonjak of June 8, 2001 in Case No. 01 CV 80.

12. Attached hereto as Exhibit 11 is the deposition of Terrance Banchy of June 7, 2001 in Case No. 01 CV 80.

Dated: June 10, 2005.

Subscribed and sworn to before me this 10 day of June 2005.

/s/ Dennis M. Sullivan
Dennis M. Sullivan

/s/ Lisa M. Blaeser
Lisa M. Blaeser, Notary Public
Eau Claire County, Wisconsin
My commission expires: 6/10/07

I Certify That on June 14, 2005
I Served the Within Document on
Counsel of Record, by Mail, Pursuant
to Wis. Stats. 801.14(2).

/s/ Lisa M. Blaeser
HERRICK & HART, S.C.

EXHIBIT 7

CAUSE NO. A-031037-C

THE CLOEREN COMPANY, PETER CLOEREN, PRODUCTION COMPONENTS-CLOEREN, INC. F/K/A PRODUCTION COMPONENTS/CHIPPEWA VALLEY DIE, INC.,	IN THE DISTRICT COURT OF
Plaintiffs,	ORANGE COUNTY, TEXAS
-VS-	
ROBERT L. DRUSCHEL, Defendant.	128th JUDICIAL DISTRICT

* * * * *

DEPOSITION OF ROBERT L. DRUSCHEL

TAKEN ON THE 10TH DAY OF JANUARY, 2005

AT HERRICK & HART

EAU CLAIRE, WISCONSIN

10:30 A.M.

* * * * *

Taken before Terri A. Stacken, RPR

www.nwcourtreporters.com

nwcr@nwcourtreporters.com

1-800-628-7551

* * *

[114] 1 of each year?

A Something in there doesn't add up, if I remember right.

Q You're paid $125,000 during the term?

A Oh, for the term, yeah. That would be correct, yes.

Q You were paid $125,000?

A Yes.

Q All right. Let's move on. Now, you said in preparation for your deposition you reviewed Mr. Cloeren's deposition and Mr. Jonjak's deposition, correct?

A Correct.

Q And you sat here through the deposition of Leigh Darrow, too, correct?

A Correct.

Q Do you recall Mr. Jonjak testifying that beginning in 1999, yourself, Leigh Darrow, Terry Banchy, had discussions concerning starting a new die company?

A Yes.

Q Is that true?

A True.

Q And you sat here as Mr. Leigh Darrow testified about that, correct?

[115] A Correct.

Q And Leigh Darrow testified that you approached him about starting up a new die company in 1999?

MR. CRAY: Would you be so kind as to ask the question again? Perhaps we can get a complete answer.

MR. JORDAN: I'll be glad to.

Q (By Mr. Jordan, continuing) Let's ask it very simply. Did you approach Leigh Darrow about starting up a new die company in 1999?

A No.

Q Who approached who?

A Leigh and Terry Banchy approached me.

Q Okay. Both Mr. Jonjak and Mr. Darrow have testified as to some meeting at a restaurant?

A Yes.

Q That occurred, correct?

A Correct.

Q Did you go to that meeting?

A Yes.

Q When Mr. Darrow, Leigh Darrow, and Mr. Banchy approached you about starting up a new die company, what did they tell you? Let's start out separately. What did Mr. Darrow tell you?

A They didn't like working at Cloeren, that the [116] place was going to hell in a handbasket. They wanted to stay in a machine shop type business, not specifically flat dies, and just wanted to know about either buying a business or starting a business, how you go about doing it.

Q Okay. What did Mr. Banchy tell you, same thing?

A Same thing.

Q Okay. How did Mr. Jonjak get involved in this?

A I don't recall. Came to the meeting.

Q Did you invite Mr. Jonjak to the meeting?

A I don't recall if I did or not.

Q Who else besides Mr. Jonjak, Mr. Darrow and Mr. Banchy were involved in these discussions?

A That was it.

Q Do you recall having a meeting at a restaurant, I can't remember the name of it, doesn't matter, a restaurant here in Eau Claire?

A Yes.

Q What was the name of the restaurant?

A Perkins.

Q That's right. This was a lunch meeting?

A Yeah. It was around lunchtime.

Q And who was in attendance at that meeting?

A Myself, Leigh and Steve Jonjak and financial guy, Kevin Koehn.

[117] Q Kevin?

A K-O-E-H-N.

Q How did you know Mr. Koehn?

A He used to work at an investment firm that I did some investing with, and also he was a partner with me for a while in an airplane.

Q This is the Chippewa?

A Chippewa Valley Aviation.

Q Who else was partners with you in Chippewa Valley Aviation?

A Christopher Blunt, who is one of the partners of Chippewa Valley Die.

Q Anybody else?

A No. Just the three of us.

Q You all owned a plane together?

A Yes.

Q What kind of plane?

A Cessna 150.

Q So you had a relationship with Mr. Koehn, he worked for brokerage house?

A At the time of this meeting, he was, had a business where he bought and actually sold businesses.

Q Okay. And it was your idea to contact Mr. Koehn?

A I said I'd contact him for them, yes.

* * *

[150] Interrogatory No. 16, see if this refreshes your recollection.

MR. CRAY: I renew the objection contained therein.

MR. JORDAN: Fine.

Q (By Mr. Jordan, continuing) What was your answer?

A At the time I did this, die business, yes.

Q Does that refresh your recollection as to what Mr. Shakal told you?

A Yes.

Q Told you they were going to start a die business?

A Okay.

Q You knew that was competing against Cloeren, didn't you?

A It could have been, yes.

Q You didn't want to hear any more?

A Nope.

Q And you didn't tell anybody, did you?

A Nope.

Q Going back to – you knew that Mr. Shakal was an employee of Cloeren, correct?

A Yes.

Q Going back to your employment agreement, specifically page 3, first, the top, you would have to agree, would you not, that your failure [151] to tell anyone about Mr. Shakal's plans breached the provisions of your

employment agreement that state, in addition to the employment duties, employee agrees to and shall furnish to employer his best advice, information, judgment and knowledge with respect to the affairs, business, business methods and practices, history, customers, employees and suppliers of employer, and to endeavor to generally preserve and increase the business of goodwill of employer in accordance with the prior practices of employee as a principal owner and officer of the business, correct?

MR. CRAY: Objection.

Q (By Mr. Jordan, continuing) Correct?

A Correct.

Q You breached that?

MR. CRAY: Objection. Go ahead and answer.

THE WITNESS: According to the way it's written, fair chance.

Q (By Mr. Jordan, continuing) And you would also have to agree that by not telling anyone about Mr. Shakal's plans, you indirectly assisted him in severing his employment relationship with [152] Cloeren?

A Say that one again.

Q By not telling anyone about Mr. Shakal's plans, you indirectly assisted him in severing his employment relationship or breaching his employment agreement with Cloeren? If you want to look at it, it's on page 5, No. C.

A I don't know if I agree with that or not.

Q You knew you had an employment agreement, correct?

A Uh-hum.

Q You have to say yes if it's yes.

A Yes.

Q If it's no, say no. You knew you had an employment agreement and you knew that, didn't you know that Mr. Shakal had a noncompete agreement?

A If that's the, what I call a secrecy agreement.

Q Right.

A Right.

Q You knew that he had some sort of contract with the company that would hamper his ability to start up a competing business, correct?

A Correct.

Q And yet you took no actions to ensure that he [153] didn't breach that agreement, correct?

A Correct.

Q Okay. And wouldn't you agree that that is directly or indirectly assisting someone in breaching their employment agreement?

MR. CRAY: Objection. Go ahead and answer.

THE WITNESS: I guess I call it very indirectly.

Q (By Mr. Jordan, continuing) Okay. Would you agree that because you were paid millions of dollars for the stock in the company that you had helped form and build up, you were in a special relationship with Production Components-Cloeren, Inc.?

MR. CRAY: Objection. Go ahead.

THE WITNESS: I guess at that point I was just an employee.

Q (By Mr. Jordan, continuing) You didn't think that you had duties greater than just a general employee since you received millions of dollars for selling that company?

A No.

Q Okay. Now, in late 2000 before, sometime after you returned from the Avery trip with Mr. Shakal

* * *

[158] dollars per manifold?

A No.

Q Do you ever recall having conversations with Paul Peelman about the situation concerning Premier Dies and the formation of Premier Dies?

A Want to repeat that, please?

Q Sure. Did you ever have any conversations with Paul Peelman about Premier Dies and the fact that it had started up as a competing business?

A Yes. In March when I was in Florida, called back to check in, that's when he told me.

Q What did Mr. Peelman tell you?

A That he and I believe it was Doug and Leigh had walked into Premier Dies and saw the guys were in operation.

Q Any other discussions that you had with Mr. Peelman about Premier Dies – well, let me ask you this way very simply. Did you ever have any discussions with Paul Peelman about whether or not you were involved with Premier Dies?

A No.

Q He never asked you what your involvement was, if any?

A With Premier Dies?

Q Yes.

[159] A I don't recall.

Q Did you have – you don't recall. Is that saying that it might have happened? I'm a little lost. Do you recall specifically having a conversation with Mr. Peelman about whether or not you were involved with Premier Dies?

A When I returned.

Q At any time?

A Oh, at any time. Well, yeah, when I returned from Florida he asked me if I was involved, and that's when I said that I had seeked legal counsel and I couldn't talk.

Q You had sought legal counsel and you couldn't talk about it?

A I was advised by the lawyer not to say anything.

Q Had you been sued at this point?

A No. When I talked to Paul, he said that, I can't remember the exact words, but the point that you might

not want to consider coming back to work. I was like, kind of scared me.

Q This is when it was found out that both Mr. Shakal and Mr. Jonjak were involved in this new competing business?

A Correct.

Q And it was found out that Mr. Jonjak was involved [160] in this competing business while you and Mr. Jonjak were on vacation down in Florida?

A Yeah. I don't know if they knew Jonjak was involved or not for sure, but they found out about Premier Dies.

Q Did you ever tell Paul Peelman that Production Components was not going to remain a viable entity in Wisconsin?

A Paul Peelman?

Q Yes.

A I don't recall that.

Q Did you tell anyone that you didn't believe that Production Components was going to remain a viable entity in Wisconsin?

A We had some kidding around the bar one night with a guy that we were jesting around. Bantering to that effect, yes.

Q Do you recall having conversations with Terry Banchy in the time period after December 2000 until March 2001 about his involvement in Premier Dies, or a new die company?

A No.

Q Okay When did you become aware that in December of 2000 Premier Dies bought a milling machine?

A I guess it would have been in March, Florida [161] trip.

Q So just to simplify this from your testimony, make sure I got these points together, subsequent to Mr. Shakal's conversation with you in December of, I'm sorry, yeah, November of 2000 and March of 2001 when it is discovered that there is a Premier Dies down the road from Cloeren, you had no conversations with any of these individuals who eventually left to form Premier Dies about their involvement?

A No.

Q What I said is correct?

A Correct.

Q And subsequent, in between those two points of reference that I just gave you, you made no efforts to tell anyone at Production Components-Cloeren, Inc. about what you knew from Mr. Shakal?

A Correct.

Q Show you the next exhibit

(Deposition Exhibit No. 9 was marked for identification)

Q (By Mr. Jordan, continuing) Okay. This is a letter dated February 4, 2001 from Robert Shakal to yourself, correct?

* * *

[174] detailed knowledge covering all aspects of design and manufacture of all types of flat extrusion and slot coating dies. This knowledge was acquired through years of experience in supplying slot coating dies as employees of Cloeren, Incorporated, formerly Production Components, of Eau Claire, Wisconsin. Do you agree with that?

A Yes. Sounds like good sales material.

Q Production Components is a recognized leader in the design and manufacture of this particular product.

A Yes.

Q And the founders of Premier Dies are the primary individuals that developed and serviced this business since the mid-1980s. Is that true?

A Let me think about that for a minute. I wouldn't say they developed it, but certainly serviced it.

Q Turning to page 4, first full paragraph. Premier Dies is composed of individuals that manage substantially all of the quotations, specifications, sales, design, engineering, manufacturing and quality assurance of precision slot coating dies for Production Components. Do you agree with that?

A Most of them, yes.

[175] Q The sentence after that, second sentence after that, the two most senior and experienced individuals at Production Components are among the owners of Premier Dies. Is that true?

A Depends on what you mean the most senior and experienced and which area.

Q Well, who's the most senior and experienced individual at Production Components concerning the slot die market in December of 2000?

A In which area?

Q Production.

A Production, be Terry Banchy.

Q And who was the most senior in the design area?

A Bob Shakal.

Q Not you? You don't consider yourself more senior than Mr. Shakal?

A Oh, did you say production? Oh, sorry. Yeah. I would have been engineering.

Q Yeah. You were the most senior person as it relates to both sales and engineering for the slot die market, correct?

A At Production Components.

Q At Production Components?

A Yes.

Q Looking at page 5, first sentence, our main [176] customer will be Avery Dennison, D-E-N-N-I-S-O-N, Corporation based in Pasadena, California. How did they know that? Do you have any idea?

A I don't follow what you're asking.

Q How did Mr. Jonjak, how could he write in your mind sales brochure and prior to March of '01 saying that

the main customer of Premier Dies will be Avery Dennison Corporation based in Pasadena, California?

A You'd have to ask him.

Q Okay. All right. So March Mr. Jonjak – oh, when did you find out that Mr. Jonjak had written this business plan?

A I think Paul had mentioned it they found it on the computer maybe.

Q So did Paul tell you that Mr. Jonjak in his business plan had identified, had said that Avery will be their main customer?

A I don't recall him saying that, no.

Q Did you ask to see a copy of this business plan?

A No.

Q So you and Mr. Jonjak talked about what his – well, he spilled his guts to you I think is the words you used?

A Yes. Right.

[177] Q And so what did you tell Paul Peelman or Peter Cloeren about what Mr. Jonjak had said to you when he spilled his guts?

A This was after the fact I talked to Paul. I didn't talk to anybody after that.

Q I understand. Paul Peelman called you. Let's see if I get the chronology correct. Paul Peelman called you, you called him, what's up, he tells you what's up, down the

road is a new die company and your buddy Bob Shakal is working there, right?

A Yes.

Q And Dean Siddons is down there, right?

A Yes.

Q You were in the Florida Keys at this time with Mr. Jonjak?

A Correct.

Q You talked to Mr. Jonjak and say, what's going on, and he spills his guts about his involvement in this new venture?

A Yes.

Q And he tells you who all is involved, correct?

A Yes.

Q And he tells you what their plans are?

A No. It was kind of more at that point I was like [178] in shock.

Q All right. What day of the week did this occur on? Monday, Tuesday, Wednesday, do you remember?

A I don't recall.

Q Well, how long between Mr. Jonjak spilling his guts to you did you return to Eau Claire, Wisconsin?

A I think it must have been on maybe a Friday. We returned on Sunday I believe it was.

Q Did you and Mr. Jonjak go fishing on Saturday?

A No. We didn't feel like doing anything.

Q What did you do on Saturday?

A Nothing.

Q Hung around the condo?

A Pretty much.

Q Is this your condo that you were at?

A Yes.

Q Had Mr. Jonjak been to your condo before this?

A Yes.

Q Did you, in fact, you let Mr. Jonjak and his wife go down there even when you weren't there to use your condo, right?

A Yes.

Q How many times you let Mr. Jonjak and his wife use your condo?

[179] A I think only once maybe.

Q And you had let Mr. Shakal and his wife use your condo, too, correct?

A Yes. In exchange for taking care of the house.

Q Did you ever let any of the Avery people use your condo?

A No.

Q Okay. So Friday Mr. Jonjak spills his guts to you, Saturday you sit around the condo, Sunday you come home to Eau Claire, right?

A Yes.

Q Well, after Mr. Jonjak spilled his guts to you and told you who all was involved, did you pick up the phone and call anyone at Production Components-Cloeren, Inc. and say, look, let me tell you, you don't know the full story, here's all the other people that are involved?

A No, I didn't.

Q In fact, you had information about who all was involved that Mr. Peelman had not relayed to you because Mr. Jonjak had spilled his guts to you, correct?

A Yes.

Q But you didn't find it prudent to contact your employer and tell them what you knew?

[180] A I guess I was more worried about myself. What Paul had said really scared me. Only thing on my mind was to seek some legal counsel.

Q What was it that Paul had said that really scared you?

A He said, you might want to consider not coming back.

Q Did he tell you why?

A No. Just that everybody was a suspect and says you might not want to consider coming back.

Q Did you tell Mr. Peelman that Mr. Jonjak was part of this at this time?

A No. Because he didn't tell me until after we hung up.

Q So let me see if I understand. Friday, I'm sorry, when this conversation with Mr. Peelman occurs, people at Production Components-Cloeren are still in the dark as to Mr. Jonjak's involvement?

A Correct.

Q Only you knew it?

A Correct.

Q And you didn't tell anybody about it?

A No.

Q Until when?

[181] A I didn't at all.

Q Never told anybody about Mr. Jonjak's involvement?

A Came back to work and they asked me a question, I said I was advised not to say anything, they said get out the door.

Q All right When you came back to work on Monday?

A Tuesday.

Q Tuesday. What did you do Monday?

A. Tried to find some legal counsel.

Q You sought legal counsel. Eventually you were able to secure legal counsel. Who was it you secured?

A Rider Bennett in Minneapolis/St Paul.

Q Rider Bennett.

A I can give you my lawyer's name if that helps. Dan Poretti.

Q You sought legal counsel. I don't want to know anything you said or your lawyer told you, although we may get into questions of waiver since apparently you're using that as a defense, but that's off the record and I object to my own sidebar comment. But did you go see Mr. Poretti on that Monday?

A Actually, I didn't go to Minneapolis. I visited,

* * *

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 1	CHIPPEWA COUNTY

ROBERT DRUSCHEL

Plaintiff,

v.

PETER CLOEREN

Defendant.

AFFIDAVIT OF DENNIS M. SULLIVAN

Case No.: 03 CV 359

(Filed Feb. 18, 2005)

STATE OF WISCONSIN)
) SS
Eau Claire County)

Dennis M. Sullivan, being first duly sworn on oath, deposes and states as follows:

1. I am an attorney licensed to practice law in the State of Wisconsin and am one of the attorneys for the defendant, Peter Cloeren, for the above-referenced matter.

2. Attached hereto as Exhibit A are true and correct copies of pages 91, 93, 95, 96, 98, 99, 100, 103, 104, 105, 106, 108, 111, 115, and 124 of the deposition of Peter Cloeren.

Dated: February 18, 2005

/s/ Dennis M. Sullivan
Dennis M. Sullivan

Subscribed and sworn to before me
this 18th day of February 2005.

[LOGO]

/s/ Lisa M. Blaeser
Lisa M. Blaeser, Notary Public
Eau Claire County, Wisconsin
My commission expires: 6/10/07

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | CHIPPEWA COUNTY

PETER CLOEREN
APRIL 8, 2004

* * *

[99] me within more or less a month – it might have been six weeks – but within a three- to six-week time frame advising me that they were coming back to the table.

Q. Did he tell you who he had talked to?

A. I believe he said he talked to Steve Johnson.

Q. And what was the next step?

A. I thought about it and told Peveto I needed to think about it. We'd been led down the path once, and I wasn't going to spend any more money being led down the path again.

Q. And what was the next thing that happened?

A. Peveto and I had some more conversations, and I told him that he was free to try to put a deal together and that I didn't want to spend a lot of my time on it until we had something of material –

Q. Substance?

A. – substance in our hands to deal with.

Q. Okay. And, I take it, Mr. Peveto did that: He worked to try to put a deal together?

A. Yes.

Q. So you were not hands-on, day-to-day, conversation-by-conversation involved?

A. No, I was not.

Q. At what point did you become reinvolved?

A. Probably in the June/July time frame.

Q. We're talking '97 now?

[100] A. June/July '97.

Q. Okay. And what happened then?

A. I think they had – I think they had reached an agreement in principal on – Peveto and –

Q. Steve?

MR. JORDAN: I object to the form.

A. I think it was between all of them, all three of the primary shareholders. At this point, Peveto brought it to my attention. And he had kept me informed along the way, so it wasn't just –

Q. (By Ms. Johnson) Do you recall today specific conversations that Mr. Peveto said he had with Bob Druschel?

A. No, I don't. The only thing that I know is I specifically asked Mr. Peveto if he had all three of the primary shareholders on board, that he had spoke to each one of them, that they were all on board, and he told me he had and they were.

Q. After Mr. Peveto told you he had a deal in principal, what was the next step, as you remember?

A. I was kind of surprised because the deal had gone from our offer of 11.6 to their demand of 13.8 down to 9.6. I was still a little skeptical at that point, given the amount of movement there was in the negotiations.

Q. Why was there so much movement? Do you know?

A. No, I don't. We were out to buy for the best price

* * *

[103] like that, but there was no . . .

Q. No nitty-gritty about security or anything like that?

A. Oh, no, no, no. No discussions on specific contractual issues or nothing, that I remember.

Q. Any other meetings between you and Mr. Druschel related, at least in general terms, to this sale?

A. Other than the closing?

Q. Yeah, okay. Beside the closing.

A. Not that I can recall, no.

Q. And the only telephone conversation that you remember specifically today is the one conference call; is that correct?

A. As I said, I'm sure – certain there were other conversations that I may have participated in, but when were they, what specifically were they about, I can't sit here and recall.

Q. All right. And the only one you can recall, though, is the joint conference call?

A. When the first deal went south, yes.

Q. Okay. And then how was – it sounds like you had very – or you recall today very little interaction between you and Bob related to this deal?

A. I had very little interaction, relatively speaking, in the whole deal.

Q. In the whole deal. Whether it be Steve Johnson, [104] Peelman or Bob?

A. Correct.

Q. Okay. Did you go up to Wisconsin to visit Production Components?

A. We went up there for a due diligence, I believe.

Q. Who is the "we"?

A. I don't know if I went or not. I don't think that I went.

Q. Mr. Peveto may have gone?

A. Peveto and our accountant at the time.

Q. Say again?

A. Our CPA firm at the time.

Q. And just so the record is clear, Cloeren, Inc., was about to buy the stock of Production Components, correct?

A. Correct.

Q. Essentially take over that business, right?

A. Correct.

Q. And there's a lot of paper involved in all of this, but part of it was a promissory note that you signed to pay Bob Druschel, Steve Johnson and Paul Peelman for the stock that they sold, correct?

A. Correct.

Q. Anything else –

A. I'm going to back up. I may have went up there for part of the due diligence. I just don't recall, but I think I [105] may have.

* * *

STATE OF WISCONSIN	CIRCUIT COURT	CHIPPEWA COUNTY

ROBERT L. DRUSCHEL
3538 Chippewa River Drive
Eau Claire, Wisconsin 54703

Plaintiff,

vs.

CASE NO.: 03 CV 359

Case Code: 30301

PETER F. CLOEREN
3410 Interstate 10 West
Orange, Texas 77630

Defendant.

AFFIDAVIT OF ANDREA M. JOHNSON

(Filed Feb. 7, 2005)

STATE OF TEXAS)
(ss.
COUNTY OF HARRIS)

Andrea M. Johnson, after first being duly sworn, on oath, states the following as true and accurate:

1. Your Affiant is an attorney licensed to practice law in the State of Texas and is one of the attorneys representing Robert L. Druschel.

2. Your Affiant attended the deposition of Peter F. Cloeren held on April 8, 2004.

3. Your Affiant has read the transcript of said deposition.

4. Attached hereto and incorporated herein as Exhibit "A" are true and correct copies of pages 1, 106,

107, 110, 111, 122, 123, 124, and 160 of the deposition of Peter F. Cloeren.

Signed this 1st day of February, 2005.

/s/ Andrea M. Johnson
Andrea M. Johnson

[SEAL]	ARLENE PEREZ NOTARY PUBLIC, STATE OF TEXAS MY COMMISSION EXPIRES SEPTEMBER 26, 2005

Subscribed and sworn to before me this 1st day of February, 2005.

/s/ Arlene Perez

Arlene Perez, Notary Public
Harris County, State of Texas
My commission expires: 9-26-2005

---

* * *

STATE OF WISCONSIN	CIRCUIT COURT	CHIPPEWA COUNTY

PETER CLOEREN
APRIL 8, 2004

[106] these three or four times a year that you had conversations –

A. Well, I take that back. We're talking about calling Wisconsin?

Q. Yeah.

A. Frequently. Every day, as a matter of fact.

MR. JORDAN: Because she's –

Q. (By Ms. Johnson) You're talking about now?

A. Now we're talking about Wisconsin.

Q. Today you're saying since the business is now part of Cloeren, Inc. –

A. That, and even prior to.

Q. And even prior to that, you were talking to them frequently?

A. You said Wisconsin. We have an employee in Wisconsin, Doug Darrow.

Q. You have an employee in Wisconsin. Okay. Who was in Wisconsin?

A. Doug Darrow.

Q. He was your sales guy up there, or what was he doing?

A. He was in sales.

Q. How long has Mr. Darrow been up in Wisconsin?

A. He was born and raised there.

Q. How long had he been working for you guys up there in Wisconsin?

A. From – I think he's been with us since the early [107] 1990s.

Q. Now, your title with Cloeren, Inc., is what? President?

A. CEO.

Q. Has it ever changed?

A. Yes.

Q. What has it been in the past?

A. I think I came to work in the company with no title. I think I've held the title of designer, manager, vice-president, president, CEO, chairman.

Q. Was this business basically started by your dad?

A. We started it together.

Q. You and your dad started it together?

A. Yes.

Q. Okay. Does your dad have any connection to the business today?

A. No.

Q. Does he own stock in it today?

A. No.

Q. So your conversations with folks in Wisconsin, at least with Doug Darrow, have been frequently, maybe even daily, since the early 1990s, correct?

A. As needed to conduct business, yes.

Q. And then in regard to Production Components, you've talked to those folks three or four times a year?

* * *

[110] closing?

MR. JORDAN: I object to the form.

A. Nothing specific. There was obviously a lot of things going on with agreements and due diligence and things like that.

Q. (By Ms. Johnson) Okay. All right. Where was the closing?

A. I signed all the papers here and we sent them up to Wisconsin.

Q. Did you go up to Wisconsin on or about September 15, 1997 when the papers may have been signed by Bob Druschel, Steve and Paul?

A. Yes, if that's the date that you're saying it was.

Q. So you were there in Wisconsin when those guys signed their half of the paperwork?

A. I don't know when they signed their half of the papers. We went up there to collect the stock certificates and tell the employees that the company had been purchased.

Q. Can you tell me why the promissory note is a note that you signed personally? Do you know why that was done that way?

A. If I recall exactly, our bank would require the shareholders – or the stockholders that were selling the stock to take a second to the bank's position. If I recall correctly, they didn't want to do that. So we did it through [111] me personally.

Q. The bank's position was as to what?

A. I believe, if memory serves me correctly, our bank's position – Cloeren, Incorporated's bank's position

was that they wanted the shareholders of Production Components to subordinate their note to the bank's note or position with Cloeren.

Q. And you're saying that the Production Components folks, whether it's Johnson, Druschel and Peelman, didn't want to do that, they didn't want to be second?

A. They didn't want to subordinate their position to our bank, correct.

Q. Right.

A. Again, Paul Peveto would know the specifics, but that's my recollection.

(Exhibit 4 marked)

Q. Let me show you what's been marked as Exhibit Number 4.

Can you tell me what that is?

A. Somebody's notes.

Q. Are they your notes?

A. No.

Q. Do you recognize the handwriting?

A. I wouldn't swear to it, but they might be Paul Peveto's.

* * *

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 1	CHIPPEWA COUNTY

ROBERT DRUSCHEL

Plaintiff,

v.

PETER CLOEREN

Defendant.

AFFIDAVIT OF DENNIS M. SULLIVAN
Case No.: 03 CV 359

STATE OF WISCONSIN)
) ss
Eau Claire County)

(Filed Jan. 18, 2005)

Dennis M. Sullivan, being first duly sworn on oath, deposes and states as follows:

1. I am the attorney for the defendant, Peter Cloeren, for the above-referenced matter.

2. Attached hereto as Exhibit A is a true and correct copy of Defendant, Peter F. Cloeren's Responses to Plaintiff, Robert L. Druschel's First Set of Interrogatories.

Dated: January 17, 2005.

/s/ Dennis M. Sullivan
Dennis M. Sullivan

Subscribed and sworn to before me
this 17th day of January 2005.

/s/ Lisa M. Blaeser
Lisa M. Blaeser, Notary Public
Eau Claire County, Wisconsin
My commission expires: 6/10/07

EXHIBIT A

STATE OF WISCONSIN	CIRCUIT COURT	CHIPPEWA COUNTY

ROBERT L. DRUSCHEL
3538 Chippewa River Drive
Eau Claire, Wisconsin 54703

Plaintiff,

vs.

CASE NO. 03 CV 359

Case Code: 30301

Peter F. Cloeren
3410 Interstate 10 West
Orange, Texas 77630

Defendant.

DEFENDANT, PETER F. CLOEREN'S RESPONSES TO PLAINTIFF, ROBERT L. DRUSCHEL'S FIRST SET OF INTERROGATORIES

TO: Robert L. Druschel
c/o Mr. Steven Cray
119 ½ North Bridge Street
P.O. Box 370
Chippewa Falls, WI 54729

Defendant Peter F. Cloeren submits these, his Answers and Objections to Plaintiff's First Set of Interrogatories.

INTERROGATORY No. 1: State the following:

A. Your full name;

B. Residence address;

C. Date of birth; and

D. Place of birth.

RESPONSE:

Peter Frank Cloeren
6325 Bentwater Dr.
Orange, Texas 77632
12/14/57
Oakland, California

INTERROGATORY No. 2: State your residence history for the past ten (10) years to present, giving the following as to each residence:

A. Full address; and

B. Duration of occupancy.

RESPONSE: I have lived in Orange County, Texas, for the past 25 years.

INTERROGATORY No. 3: State your educational history, giving the following:

A. Name and address of each school attended;

B. Dates of attendance;

C. Degree(s) conferred or highest grade completed.

RESPONSE: High School – Tennyson High School
Hayward California
1972-1976
Graduated

INTERROGATORY No. 4: Have you ever been convicted of a crime (felony or misdemeanor) other than any minor traffic violation? If so, please state and identify each conviction by:

A. Date;

B. Court; and

C. Offense.

RESPONSE: Defendant objects to this Interrogatory as overly broad, beyond the scope of permissible discovery, and not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY No. 5: Do you have an ownership interest in any Wisconsin corporation or business?

RESPONSE: No.

INTERROGATORY No. 6: If your answer to the previous Interrogatory was "yes", set forth in detail the following:

A. Name of Wisconsin corporation or business;

B. Wisconsin address for the corporation or business; and

C. Describe, in detail, the ownership interest in the Wisconsin corporation or business.

RESPONSE: N/A.

INTERROGATORY No. 7: State whether any business or corporation in which you have more than a ten percent (10%) ownership interest in conducts business in the State of Wisconsin.

RESPONSE: Yes.

INTERROGATORY No. 8: If your answer to the previous Interrogatory was "yes", set forth in detail the following:

A. Name of Wisconsin corporation or business;

B. Wisconsin address for the corporation or business; and

C. Describe, in detail, the ownership interest in the Wisconsin corporation or business.

RESPONSE: Defendant objects to this Interrogatory as vague and ambiguous, and nonsensical, as Interrogatory No. 7 inquires about corporations which conduct business in Wisconsin, not Wisconsin corporations. Subject to and without waiving the foregoing objection:

Defendant owns more than 10% of Cloeren Incorporated, a Texas corporation, which owns 100% of Production Components-Cloeren, Incorporated, which does business in Wisconsin and is a Wisconsin corporation.

Cloeren Incorporated
401 16th Street
Orange, TX 77630

Production Components-Cloeren, Incorporated
3240 Louis Avenue
Eau Claire, WI 54703

INTERROGATORY No. 9: Do you now have or did you in the past ten (10) years ever have an ownership interest in any bank or other financial institution account held by a bank or branch bank located in the State of Wisconsin?

RESPONSE: Defendant objects to this Interrogatory as overly broad, and vague and ambiguous. Subject to and without waiving the foregoing objection:

Defendant does not have any ownership interest in any bank account or other financial institution account held by a bank branch located in Wisconsin.

INTERROGATORY No. 10: If your answer to the previous Interrogatory was "yes", set forth in detail the following:

A. Name of the financial institution;

B. They type of account; and

C. The length of time the account has been in existence.

RESPONSE: N/A.

INTERROGATORY No. 11: Are you a signatory on any bank or financial institution account which bank or financial institution is located in the State of Wisconsin?

RESPONSE: Defendant objects to this Interrogatory as overly broad, and vague and ambiguous. Subject to and without waiving the foregoing objection;

Defendant is not a signatory on any bank account or other financial institution account held by a bank branch located in Wisconsin.

INTERROGATORY No. 12: If your answer to the previous Interrogatory was "yes", set forth in detail the following:

A. Name of the financial institution;

B. The type of account; and

C. The length of time the account has been in existence.

RESPONSE: N/A.

INTERROGATORY No. 13: Do you own or lease any real estate in the State of Wisconsin?

RESPONSE: No.

INTERROGATORY No. 14: If your answer to the previous Interrogatory was "yes", set forth in detail the following:

A. The street address of the real estate;

B. State whether the real estate is owned or leased; and

C. State the length of time real estate owned or leased.

RESPONSE: N/A.

INTERROGATORY No. 15: Have you had a telephone conversation with a person or entity who was located in the State of Wisconsin during the telephone conversation in the past seven (7) years?

RESPONSE: Yes, in my corporate capacity.

INTERROGATORY No. 16: If your answer to the previous Interrogatory was "yes" set forth in detail the following:

A. Name of person or entity with whom the telephone conversation was held;

B. The date of the telephone conversation; and

C. Approximate length of the telephone conversation.

RESPONSE: Objection. Defendant objects to this Interrogatory as it is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, Defendant objects as Defendant cannot reasonably be expected to recall the date and length of telephone conversations that Defendant, in his corporate capacity, has had with persons or entities in Wisconsin over the last seven years.

INTERROGATORY No. 17: Have you been physically present in the State of Wisconsin in the past ten (10) years?

RESPONSE: Yes.

INTERROGATORY No. 18: If your answer to the previous Interrogatory was "yes", set forth in detail the following:

A. Date of each visit to the State of Wisconsin;

B. The duration of each visit to the State of Wisconsin; and

C. The nature of the visit to the State of Wisconsin.

RESPONSE: Objection, Defendant objects to this Interrogatory as it is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Defendant cannot reasonably be expected to recall the date and length of visits to Wisconsin that Defendant, in his corporate capacity, has made over the last ten years.

INTERROGATORY No. 19: Other than the present lawsuit, have you been involved in a lawsuit in a Wisconsin Court or a Federal Court located in the State of Wisconsin during the past ten (10) years?

RESPONSE: No, not in my individual capacity.

INTERROGATORY No. 20: If your answer to the previous Interrogatory was "yes", set forth in detail the following:

A. The name of the lawsuit;

B. The Court in which the lawsuit was heard;

C. A brief description of the lawsuit; and

D. The case number of the lawsuit.

RESPONSE: N/A

INTERROGATORY No. 21: Have you ever testified in a court located in the State of Wisconsin?

RESPONSE: Yes, as a corporate representative.

INTERROGATORY No. 22: If your answer to the previous Interrogatory was "yes", set forth in detail the following:

A. When the testimony occurred;

B. Where the testimony occurred; and

C. The nature of your testimony.

RESPONSE:

A. March 16, 2001.

B. Chippewa Falls, Wisconsin.

C. Hearing related to Chippewa County Case 01 CV 80.

INTERROGATORY No. 23: During the past ten (10) years have you issued any check(s) to any persons or business entities located in the State of Wisconsin?

RESPONSE: No checks, to the best of my knowledge.

INTERROGATORY No. 24: If your answer to the previous Interrogatory was "yes", set forth in detail the following:

A. The name or a person of the business entity to whom the check(s) was sent;

B. The amount of the check(s); and

C. The purpose of the check(s).

RESPONSE: N/A.

INTERROGATORY No. 25: Are you an officer, director, partner, or member of a Wisconsin corporation or business entity?

RESPONSE: Yes.

INTERROGATORY No. 26: If your answer to the previous Interrogatory was "yes", set forth in detail the following:

A. Name of the business in which the position was held;

B. List the position or job title held;

C. Length of time position was held; and

D. Compensation received for position.

RESPONSE: I have been the President of Production Components-Cloeren, Incorporated since 1997. No compensation.

INTERROGATORY No. 27: Have you received income from a Wisconsin business or entity, or from a Wisconsin investment?

RESPONSE: Defendant objects to this Interrogatory as overly broad and unduly burdensome. Subject to and without waiving this objection: No.

INTERROGATORY No. 28: If your answer to the previous Interrogatory was "yes", set forth in detail the following:

A. A description of the income received;

B. The Wisconsin business or entity from whom the income was received;

C. The amount of income received; and

D. The year in which the income was received.

RESPONSE: N/A.

INTERROGATORY No. 29: For each Request to Admit made by Robert Druschel in the First Set of Requests for Admissions, to which you have responded with a denial, set forth the basis for your denial.

RESPONSE: The Exhibits were signed by Defendant in Orange, Texas.

INTERROGATORY No. 30: Set forth each evidentiary fact which supports a denial of a request for admission.

RESPONSE: The Exhibits were signed by me in Orange, Texas.

INTERROGATORY No. 31: Set forth the name, address, telephone number, and employer of each witness who can testify to each such evidentiary fact.

RESPONSE: Peter Cloeren
Cloeren Incorporated
401 16th Street
Orange, TX 77630
(409) 951-7600

Paul Peveto
Cloeren Incorporated
401 16th Street
Orange, TX 77630
(409) 951-7600

INTERROGATORY No. 32: Identify each document which supports your denial of such request for admission.

RESPONSE: Objection. This Interrogatory is vague and potentially calls for the production of attorney work product and/or documents protected by the attorney/client privilege. Subject to and without waiving the foregoing objections, see the documents attached to the Requests for Admissions. Defendant reserves the right to supplement at a later date.

STATE OF TEXAS)
) ss.
Orange County)

Peter F. Cloeren, being duly sworn, says that the Answers to the Interrogatories herein submitted are true to the best of his knowledge and belief.

Dated this 13 day of February, 2004.

/s/ Peter F. Cloeren
Peter F. Cloeren

Signed and sworn to before me
on this 13 day of February, 2004.

(STAMP)
NACOLE FISETTE
Notary Public
State of Texas
Comm. Expires 03-26-2006

/s/ Nacoie Fisette
Notary Public, State of Texas
My commission expires:

AS TO OBJECTIONS

Dated this 16th day of February, 2004.

HERRICK & HART, S.C.

By: /s/ Dennis M. Sullivan
Dennis M. Sullivan
Attorneys for the Defendant
State Bar Number: 1016053

Post Office Address:
116 West Grand Avenue
Post Office Box 167
Eau Claire, WI 54702-0167
(715) 832-3491

I Certify That on February 16, 2004
I Served the Within Document on
Counsel of Record, by Mail,
Pursuant to Wis. Stats. 801.14(2)

/s/ [Illegible]
HERRICK & HART, S.C.

BEST AVAILABLE COPY

No. 06-949

Supreme Court, U.S.
FILED
FEB - 8 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

PETER F. CLOEREN,

Petitioner,

v.

ROBERT L. DRUSCHEL,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Wisconsin, District III

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN R. CRAY
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Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Where an individual has personally signed the promissory note for the purchase of a forum state business, and has continued to contact the forum state for the purpose of operating that business, may the individual's post-sale contacts be considered in establishing personal jurisdiction over the individual in the forum state?

2. Does the fiduciary shield doctrine present an important federal question?

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OPINION AND ORDER AT ISSUE IN THE CASE

Respondent has no additions to the Opinions and Order at issue referenced by the Petitioner.

BASIS OF JURISDICTION

Respondent agrees with the Petitioner's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent has no additions to the statutes and regulations referenced by the Petitioner.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Peter F. Cloeren is the CEO and majority shareholder of The Cloeren Company a/k/a Cloeren, Inc. ("Cloeren, Inc."), a Texas corporation and a business started by Mr. Cloeren and his father. (Pet. App. at 57-58, 106-107). Mr. Cloeren is also the President of Production Components-Cloeren, Inc., a Wisconsin corporation acquired by Cloeren, Inc. in 1997. (Pet. App. at 119).

Since the early 1990s, Cloeren, Inc. has had an employee located in Wisconsin who was engaged in sales. (Pet. App. at 106). Mr. Cloeren has been in daily contact by telephone with employees of Cloeren, Inc. and Production Components-Cloeren, Inc. when those employees were

located in the State of Wisconsin. (Pet. App. at 105, 107, 116).

In 1997, Mr. Cloeren and others, on behalf of Cloeren, Inc., began serious discussions to purchase a business then known as Production Components/Chippewa Valley Die, Inc. ("Production Components"), a Wisconsin corporation located in Eau Claire, Wisconsin. (Pet. App. at 2). Robert L. Druschel ("Druschel") was a stockholder of Production Components. (Pet. App. at 57).

Eventually, in September 1997, Mr. Cloeren traveled to Eau Claire, Wisconsin to close the sale of the Wisconsin corporation, Production Components, to Cloeren, Inc. (Pet. App. at 108). After the closing, Production Components was renamed Production Components-Cloeren, Inc. (Pet. App. at 2, 59). Druschel agreed to stay on as an employee of the Wisconsin corporation. (Pet. App. at 2).

In partial payment for the sale of Druschel's stock to Cloeren, Inc., Mr. Cloeren personally signed and executed a Secured Promissory Note pledging to pay Druschel the sum of $2,200,000.00. (Pet. App. at 58). Mr. Cloeren also personally signed a Security Agreement-Pledge and Escrow Agreement pledging the stock Mr. Cloeren owned in Cloeren, Inc. as collateral to secure his Promissory Note. (Pet. App. at 58).

On or about February 26, 1998, Mr. Cloeren personally signed a Replacement Promissory Note. (Pet. App. at 59). Mr. Cloeren made several payments pursuant to the Secured Promissory Note and the Replacement Secured Promissory Note. (Pet. App. at 59-61).

Since 1997, in addition to his almost daily telephone calls, Mr. Cloeren has traveled to the Eau Claire, Wisconsin area approximately six to eight times. (Pet. App. at 26). Mr. Cloeren stayed two to four days each visit. (Pet. App. at 26).

In 2001, Production Components-Cloeren, Inc. began a lawsuit against some of its former employees in Chippewa County Circuit Court as Case No. 2001 CV 80. This lawsuit was personally authorized by Mr. Cloeren. (Pet. App. at 27). Mr. Cloeren appeared in Chippewa County, Wisconsin Circuit Court on March 16, 2001 to provide testimony in the lawsuit on behalf of Production Components-Cloeren, Inc. (Pet. App. at 118). In September of 2001, Druschel was named as an additional defendant in that litigation. (Pet. App. at 60). On December 10, 2001, Circuit Court Judge Roderick A. Cameron granted an order for judgment in favor of Druschel dismissing the causes of action against him in the Production Components-Cloeren, Inc. lawsuit. (Pet. App. at 60). This ruling was affirmed by the Wisconsin Court of Appeals on July 30, 2002. (Pet. App. at 60).

On June 19, 2003, Druschel sent notification to Mr. Cloeren stating Druschel's intent to exercise his option to declare due and owing the entire unpaid balance of the Replacement Secured Promissory Note, together with accrued interest due and payable as of September 1, 2003. (Pet. App. at 60-61). Mr. Cloeren failed to pay that balance. Druschel has received no payments of any kind from Mr. Cloeren pursuant to the Replacement Secured Promissory Note since September of 2002. (Pet. App. at 61).

II. PROCEDURAL HISTORY

Based on the default of Mr. Cloeren on the payments due on the Promissory Note, Druschel commenced the present lawsuit against Mr. Cloeren. (Pet. App. at 41).

On March 15, 2005, the Circuit Court entered an amended order which denied the motion of Mr. Cloeren for a dismissal for lack of personal jurisdiction. (Pet. App. at 26-28). The Circuit Court in its Amended Order Denying Defendant's Motion to Dismiss for Lack of Personal Jurisdiction over Defendant made the following findings of fact:

1. The Defendant has had six to eight visits to the State of Wisconsin since 1997. Said visits lasted from two to four days at a time;

2. The Defendant had approximately four conversations a week with Douglas Darrow while Douglas Darrow was in the State of Wisconsin. The topics of these conversations were sales, marketing, pending orders, employees, manifold designs for dies, and personal matters;

3. The Defendant had approximately two conversations a month with Leigh Darrow while Leigh Darrow was in the State of Wisconsin. The topics of these conversations generally regarded sales of Cloeren products;

4. The Defendant is involved in the management and owner of Cloeren, Inc.

5. Cloeren, Inc. is the owner of Production Components-Cloeren, Inc.

6. The Defendant is actively involved in the daily operation of Production Components-Cloeren, Inc. located in the City of Eau Claire, Chippewa County, Wisconsin;

7. The Defendant has had continuous and systematic general business contacts with the State of Wisconsin.

8. The contacts with the State of Wisconsin were substantial in nature and quality;

9. The visits were not the type of visits where someone changes planes or comes to the State of Wisconsin simply because a person has been sued;

10. The telephone calls constitute substantial contact with the State of Wisconsin;

11. The personal visits constitute substantial contact with the State of Wisconsin;

12. The State of Wisconsin has an interest in the present case in seeing the Plaintiff, a resident of Chippewa County, Wisconsin, was able to obtain relief in Wisconsin courts;

13. The Circuit Court for Chippewa County, Wisconsin is a convenient forum for the Plaintiff;

14. The Defendant, in approximately 2001, caused a lawsuit by a business he owns to be commenced against several individuals in the State of Wisconsin, including the present Plaintiff;

15. The legal issues in the present case are not complicated. It is unlikely the case will involve much discovery. The only issue is whether the Defendant paid the balance due on the promissory note. Determination of the issues will largely rely on documentation. The burden on the Defendant for defending this case in the State of Wisconsin is therefore not significant;

16. The State of Wisconsin has a great interest in having the case adjudicated here. It is in the

Plaintiff's interest in obtaining convenient and effective relief;

17. The interstate judicial system's interest in obtaining the most efficient resolution of the controversy is great and can be accomplished in the State of Wisconsin;

18. The shared interest of the several states in furthering fundamental and substantive social policies, such as are relevant in the present case, are not impeded by keeping the action in the State of Wisconsin.

In Mr. Cloeren's Answer to the Complaint of Druschel, Mr. Cloeren admitted he had defaulted on the Note but claimed Druschel had breached certain duties and obligations he owed to Production Components-Cloeren, Inc. (Pet. App. at 45). These were the same allegations made against Druschel in the 2001 Wisconsin lawsuit. Contrary to the assertions in the Petition for Writ of Certiorari (hereinafter "Petition"), at Pages 3 and 4, the claim Druschel violated any of his contractual agreements with Production Components-Cloeren, Inc. and whether these form an offset are issues disputed by Druschel and have never been proven. (Pet. App. at 12).

The Circuit Court, on August 29, 2005, granted summary judgment in favor of Druschel and against Mr. Cloeren. (Pet. App. at 15). In his oral decision, the Circuit Court found there were no issues of material fact which were in dispute in the lawsuit. (Pet. App. at 18). As to the affirmative defenses of Mr. Cloeren, the Circuit Court found that any offsets to which Mr. Cloeren claimed to be entitled were barred because of Mr. Cloeren's failure to follow the terms of the Stock Purchase Agreement which relate to such offsets. (Pet. App. at 20-22). The Circuit

Court also found that any possible claims Mr. Cloeren may have were barred by the doctrine of claim preclusion as the result of the previous lawsuit between Production Components-Cloeren, Inc. and Druschel, Chippewa County Case No. 01 CV 80. (Pet. App. at 22-23).

On October 11, 2005, Mr. Cloeren filed a Notice of Appeal with the Wisconsin Court of Appeals. The Wisconsin Court of Appeals, in its published decision in *Druschel v. Cloeren*, 2006 WI App 190, 723 N.W.2d 430, held Wisconsin had personal jurisdiction over Mr. Cloeren under the terms of the Wisconsin long arm statute; Mr. Cloeren's Wisconsin contacts were sufficient to satisfy the due process requirements for asserting personal jurisdiction; the Wisconsin courts had specific jurisdiction over Mr. Cloeren; and Mr. Cloeren was not entitled to offset damages under the plain language of the Stock Purchase Agreement. (Pet. App. at 1-12). Contrary to the claims of Petitioner, at Pages 3, 6, and 7 of the Petition, both the Wisconsin Court of Appeals and the trial court based their findings of personal jurisdiction over Mr. Cloeren on contacts both before and after the purchase of Production Components, including daily contacts with employees of Cloeren, Inc. and Production Compoents-Cloeren, Inc. while those employees were in Wisconsin. (Pet. App. at 5).

In discussing compliance with the due process clause of the Fourteenth Amendment to the United States Constitution, the Wisconsin Court of Appeals found the fiduciary shield doctrine has not been adopted in Wisconsin and that Mr. Cloeren's contacts were a direct result of his personal stake in the business evidenced by the Promissory Note he personally signed. (Pet. App. at 8). Contrary to Footnote 3 on Page 5 of the Petition, the Wisconsin Court of Appeals concluded that because Wisconsin has

specific jurisdiction over Mr. Cloeren, it did not need to address whether general jurisdiction exists as well. (Pet. App. at 9).

On August 31, 2006, Mr. Cloeren petitioned the Wisconsin Supreme Court for review. On October 10, 2006, the Wisconsin Supreme Court denied the Petition for Review without further comment. (Pet. App. at 39-40).

ARGUMENT

I. The Wisconsin Court's Finding Of Personal Jurisdiction Over Peter F. Cloeren Is Consistent With Existing Case Law.

Mr. Cloeren's argument is based upon the false premise that relevant Supreme Court decisions failed to provide him adequate guidance as to whether his activities "may subject [him] to the jurisdiction of [the State of Wisconsin]," (*Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment) such that he must resort to the allegedly conflicting Courts of Appeals decisions to determine the answer to that question. To the contrary, *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985), provided ample warning to Mr. Cloeren that his actions in entering into contractual agreements related to the purchase of a Wisconsin corporation and his subsequent involvement in the operation of that corporation *in Wisconsin* would subject him to the jurisdiction of the Wisconsin courts for any action alleging a breach of one of those contractual documents.

Mr. Cloeren argues in his Petition at Page 8 that facts in the present case present a jurisdictional question which was identified but not decided in this Court's decision in

Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984). It should be noted this Court has previously denied a Writ of Certiorari when presented with an identical argument. *Tak How Investment Limited v. Nowak*, 520 U.S. 1155 (1997). Mr. Cloeren relies upon a single footnote in the *Helicopteros* decision for his argument. However, Mr. Cloeren's concerns attributed to the *Helicopteros* decision as to how this Court might answer that theoretical question are irrelevant in light of this Court's subsequent decision in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985).

When analyzed under the *Burger King* framework, the facts of the instant case simply do not require this Court to address the "relatedness" issue described in great detail in the Petition. While the United States Courts of Appeals has indeed used a wide variety of language in describing the decision-making process to be applied under the *Burger King* rule, under any version of the *Burger King* rule, relatedness may be found in the instant matter. This case does not present a fact situation where review is necessary as the appropriate rule has been long established.

In discussing the jurisdictional issues before it in the *Burger King* case, this Court noted the well established requirement that an individual have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," 471 U.S. 472, *quoting Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment). This Court went on to reiterate that this requirement:

> is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum,

> and the litigation results from alleged injuries that 'arise out of or relate to' those activities.

Burger King, 471 U.S. at 472-73 (internal citations omitted).

Additionally, this Court stated:

> with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other State for the consequences of their activities.

Id. at 473. And further:

> Moreover, where individuals "purposefully derive benefit" from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity," it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.

471 U.S. at 473-74 (internal citations omitted).

In discussing the particulars of the "purposeful availment" requirement, this Court noted that where a defendant "has created 'continuing obligations' between

himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there. . . ." 471 U.S. at 476. The commercial actor's lack of physical contacts cannot defeat personal jurisdiction so long as he has "purposefully directed" his efforts to residents of the forum State. *Id.*

In applying the principles discussed to the facts of the *Burger King* case, this Court:

> emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." It is these factors – prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing – that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

471 U.S. at 479 (citations omitted). The Court then held that Rudzewicz, a Michigan resident, had "deliberately 'reach[ed] out beyond' Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization" and that his resulting contacts with the forum State could "in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated.'" *Id.* at 479-80.

In any event, even if resort to the various Courts of Appeals tests described by Mr. Cloeren in his Petition at Pages 12 through 22 were necessary, the facts of the

instant case support a finding of jurisdiction under any and all of the described analyses.

For example, Mr. Cloeren discusses the "proximate cause" analysis at Pages 12-16 of his Petition, and claims the facts in this case would fail under this version of the relatedness requirement. This is not accurate and the Wisconsin Court of Appeal's decision demonstrates the requirements of the "proximate cause" test would be met. (Pet. App. at 8-9).

Pursuant to the "proximate cause" relatedness requirement, Druschel needs to show the contacts which were the legal cause of the injury form an important or material element of proof in his case. In this case, the injury complained of was Mr. Cloeren's personal failure to make the payments to which he had individually obligated himself pursuant to the Promissory Note included among the contracts comprising the purchase of the Wisconsin corporation. The contacts which were the legal cause of that injury were all those contacts related to the "real object of the business transaction," which was the purchase of the Wisconsin corporation by Mr. Cloeren's Texas corporation. The Promissory Note at the heart of this litigation forms an integral part of the purchase contracts themselves which were the direct result of and indeed the motivation for Mr. Cloeren's contacts with Wisconsin. Therefore, pursuant to the "proximate cause" test, Mr. Cloeren urges this Court to consider that relatedness would be found sufficient to support the exercise of specific jurisdiction by the Wisconsin courts.

The "but for" analysis is described by Mr. Cloeren at Pages 16-18 of his Petition. According to Mr. Cloeren, under this test, relatedness will be found if the plaintiff's

claims would not have arisen "but for" the defendant's contacts with the forum state. Even if one accepts Mr. Cloeren's description of the Ninth Circuit process of evaluating claims of personal jurisdiction, there appears to be no argument that the facts of this case would give rise to personal jurisdiction over Mr. Cloeren pursuant to the "but for" test. Mr. Cloeren individually signed the Promissory Note as part of the purchase and subsequent operation of a Wisconsin corporation. Druschel instituted this litigation claiming Mr. Cloeren failed to make the payments called for in the Promissory Note. "But for" Mr. Cloeren's execution of the Promissory Note, Druschel would have had no claim for the breach of that Note.

The next test described by Mr. Cloeren at Pages 18-19 of his Petition is the "in the wake of" test. Mr. Cloeren admits this test "lies closest to the First Circuit's 'proximate cause' standard." (Pet. App. at 18). In order to comply with this test, Druschel's claims must lie "in the wake" of the Wisconsin transaction. See *Heil v. Morrison Knudsen Corp.*, 863 F.2d 546, 549 (7th Cir. 1988). As previously noted, Druschel's claim for breach of the Promissory Note arises directly out of the execution by Mr. Cloeren of that same Promissory Note as part of the purchase of the Wisconsin corporation. It not only lies "in the wake of" the purchase and operation of the Wisconsin corporation, it lies *directly* in the wake of that purchase and arises directly from that purchase. Therefore, the facts of this case would also lead to a finding of personal jurisdiction under the "in the wake of" test.

Finally, Mr. Cloeren also describes a "substantial connection" test he says is employed by the Sixth Circuit. (Pet. App. at 19-20). This test requires, according to Mr. Cloeren, that a substantial connection must exist between

the cause of action and the defendant's forum activities. Again, Druschel's cause of action for Mr. Cloeren's breach of the Promissory Note arises directly out of Mr. Cloeren's contacts with the forum state in purchasing and operating the Wisconsin corporation. The Promissory Note was executed as part of the purchase documents themselves and provided the financing for Mr. Cloeren's purchase of Druschel's stock in the Wisconsin corporation. Thus, there is a substantial connection between the purchase and operation of the Wisconsin corporation and Druschel's claim for breach of the Promissory Note which was a critical part of that forum transaction.

Under any of the "relatedness" tests described in the Petition, personal jurisdiction would be found over Mr. Cloeren in the forum state of Wisconsin. It is not, therefore, necessary for this Court to grant Mr. Cloeren's Petition in order to sort out any alleged "chaos" amongst the Courts of Appeals. Further, the *Burger King*, 471 U.S. 462 (1985), decision provides all the answers necessary for determining that the Wisconsin Court of Appeals did not err in finding Wisconsin had personal jurisdiction over Mr. Cloeren.

In the instant case, Mr. Cloeren, a resident of the State of Texas, similarly "deliberately reached out beyond" Texas and negotiated with the shareholders of a Wisconsin corporation for the purchase of that corporation. (Pet. App. at 2). Mr. Cloeren personally attended the closing of the business purchase in Wisconsin. (Pet. App. at 108). Mr. Cloeren individually obligated himself to payments in excess of $2 Million to Druschel. (Pet. App. at 58). Mr. Cloeren personally pledged the stock he owned in Cloeren, Inc. as collateral. (Pet. App. at 58). Mr. Cloeren continued his involvement with the forum State of Wisconsin by being

actively involved in the daily operation of the Wisconsin corporation and by having consistent and systematic general business contacts with that forum state. (Pet. App. at 26). Mr. Cloeren's daily involvement with the Wisconsin business was found by the trial court to be "substantial in nature and quality." (Pet. App. at 26).

The parallels with the facts of *Burger King* are unmistakable and Mr. Cloeren cannot reasonably claim to be inadequately guided by this Court's precedents on the question of whether his activities in contracting to purchase and operate a Wisconsin corporation would result in his being haled into court there for an alleged breach of the very Promissory Note which was a necessary element of the purchase contracts. The dispute which was the subject of the Wisconsin litigation grew directly out of the purchase contracts which had a "substantial connection" with the forum State. For this reason, it was, as in *Burger King*, "at the very least, presumptively reasonable" for Mr. Cloeren to be called to account in Wisconsin for the injuries. 471 U.S. 480. The claimed split cannot logically have confused Mr. Cloeren as to his exposure to suit in Wisconsin.

Mr. Cloeren further attempts to confuse the issue by asserting that his contacts with the forum State of Wisconsin arising out of the purchase of the Wisconsin corporation constituted an entirely separate transaction from Mr. Cloeren's contacts arising out of the subsequent post sale operation of the Wisconsin corporation. (Pet. App. at 6). This attempt is not supported by existing case law. As noted above, this Court, in *Burger King*, considered the parties "prior negotiations and contemplated future consequences" as a whole in determining whether specific jurisdiction existed sufficient to hale a defendant into

court for failing to make payments due under contracts entered into for the purchase of a franchise. The *Burger King* decision did not artificially separate the contracts which accomplished the purchase of the franchise from the "real object of the business transaction" which included the subsequent operation of that franchise. Similarly, *Burger King* does not support Mr. Cloeren's attempts to separate the contracts which accomplished the purchase of the Wisconsin corporation from the "real object" of that transaction, which included the subsequent operation *in Wisconsin* of that Wisconsin corporation.

Because the Wisconsin Court of Appeals did not decide the jurisdictional question in a way which conflicts with the decision of a United States Courts of Appeals, Mr. Cloeren has not demonstrated a compelling reason for granting his Petition.

II. The Fiduciary Shield Doctrine Does Not Provide A Basis For This Case To Be Reviewed By This Court.

Rule 10 of the Supreme Court of the United States provides considerations governing the review on *certiorari*. As argued below, there are no conflicting decisions amongst the United States Circuit Courts of Appeals on an important federal question involving the fiduciary shield doctrine. There is no conflict of decisions between the Wisconsin Supreme Court and any of the United States Courts of Appeals as to the fiduciary shield doctrine. There is also no conflict between a decision of the Wisconsin Supreme Court and another state court of last resort on an important federal question. There has been no departure from previous statutory or case law. Finally, the fiduciary

shield doctrin[illegible]self does not present an important federal question which needs to be settled by this Court.

A. There Is No Conflict Among The United States Courts Of Appeals On An Important Federal Question In Relation To The Fiduciary Shield Doctrine.

Mr. Cloeren does not cite any United States Courts of Appeals decisions actually stating that personal jurisdiction over corporate officers acting in a fiduciary capacity would violate the due process clause of the 14th Amendment to the United States Constitution. The Petition does reference *Weller v. Cromwell Oil Company*, 504 F.2d 927 (6th Cir. 1974) for expressing doubt over whether the activities of a corporate officer on behalf of a corporation were sufficient to comport with due process clause of the 14th Amendment to the United States Constitution. This proposition and concern has been subsequently addressed by this Court.

In *Calder v. Jones*, 465 U.S. 783 (1984) this Court stated at Page 790:

> Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually. See *Rush v. Savchuk*, 444 U.S., at 332, 100 S.Ct., at 579 ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction").

The principle that the employment status of an individual is not a factor in determining jurisdiction was also noted in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) in which this Court noted at Footnote 13, "In *Calder v. Jones*, at ___, 104 S.Ct., at 1487, we today reject the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity."

Subsequent to the *Calder* and *Keeton* decisions, this Court announced its decision in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985) where the Court discussed at length the constitutional protections under the due process clause of the 14th Amendment to the United States Constitution in relation to jurisdiction over a person. The Court's analysis was made without distinction between actions performed by Mr. Rudzewicz personally and actions performed as a representative of RMBK Corp., the corporation which held the Burger King franchise. The *Burger King* analysis focused on all the personal activities of Mr. Rudzewicz in relation to the State of Florida and its residents. The Petition therefore fails to show a split between the United States Courts of Appeals on the issue of the use and application of the fiduciary shield doctrine.

B. As The Wisconsin Supreme Court Issued No Decision In This Case, There Is No Conflict On An Important Federal Question Between The Wisconsin Supreme Court And Any United States Courts Of Appeals Or Court Of Last Resort Of Another State.

Procedurally, the Wisconsin Court of Appeals issued its decision affirming the prior decision of the trial court finding personal jurisdiction over Mr. Cloeren. (Pet. App.

at 1). Mr. Cloeren then petitioned the Wisconsin Supreme Court for review of the decision of the Court of Appeals. The Wisconsin Supreme Court denied the petition for review without comment on October 10, 2006. (Pet. App. at 39-40). In the present case, there has been no written decision at all by the Wisconsin Supreme Court, Wisconsin's court of last resort. Other courts have noted that the Wisconsin Supreme Court has not previously ruled on the applicability of the fiduciary shield doctrine in Wisconsin. *Hardin Roller Corporation v. Universal Printing Machinery, Inc.*, 236 F.3d 839 (7th Cir. 2001) at Page 842; *Norkol/Fibercore, Inc. v. Gubb*, 279 F.Supp.2d 993 (E.D. Wis. 2003).

Because there is no Wisconsin Supreme Court decision, there is therefore no conflict between a decision of the Wisconsin Supreme Court, the various United States Courts of Appeals, or with a decision of another state's court of last resort.

C. As The Fiduciary Shield Doctrine Does Not Pose An Important Question Of Federal Law, This Case Does Not Present A Question Of Federal Law Which Needs To Be Settled By The United States Supreme Court.

In discussing the fiduciary shield doctrine, the Ninth Circuit Court of Appeals stated in *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 521 (9th Cir. 1989), "Although the assertion of personal jurisdiction in general is an issue of constitutional dimensions, the Supreme Court appears to have signalled that the question whether there exists a jurisdictional corporate shield is not such an issue."

The Ninth Circuit Court of Appeals then cites *Calder v. Jones*, 465 U.S. 783 (1984), and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984):

> The Calder Court stated, "Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually." 465 U.S. at 790, 104 S.Ct. at 1487. The Court echoed these statements in *Keeton v. Hustler Magazine, Inc.*: "It does not of course follow from the fact that jurisdiction may be asserted over Hustler Magazine, Inc., that jurisdiction may also be asserted over either of the other [individual] defendants ... [But] we today reject the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity." 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473, 1482 n. 13, 79 L.Ed.2d 790 (1984). Thus in both *Calder* and *Keeton*, the Supreme Court applied the constitutional due process analysis to the contacts of the individuals concerned; it did not consider the existence of a state-created corporation form to create a due process limit on jurisdiction.

Davis, 885 F.2d at 521.

The Seventh Circuit Court of Appeals in its decision in *Hardin Roller Corporation v. Universal Printing Machinery, Inc.*, 236 F.3d 839, 842 (7th Cir. 2001) used similar logic:

> *Calder v. Jones* and *Keeton v. Hustler* establish that the Constitution does not shield persons who act as corporate agents from individual-capacity suits. Thus the fiduciary-shield doctrine is a matter of state law only, and many states do not employ it.

> See generally Sonja Larson, *Validity, Construction, and Application of "Fiduciary Shield" Doctrine – Modern Cases*, 79 A.L.R. (5th series) 587 (2000).

Hardin Roller Corporation, 236 F.3d at 842. (citations omitted).

The fiduciary shield doctrine is not a federal issue but an option available to the states to allow individual defendants additional protections beyond what is required under the due process provisions of the United States Constitution. As this Court and decisions at the United States Courts of Appeals level have already determined the fiduciary shield doctrine does not pose an important federal question, the fiduciary shield doctrine does not provide a basis for review of this case by this Court.

CONCLUSION

The Petition of Mr. Cloeren does not provide a convincing or compelling reason for this Court to grant the Petition. The Respondent therefore respectfully requests the Petition be denied.

Dated this 8th day of February, 2007.

Respectfully submitted,

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In The

Supreme Court of the United States

PETER F. CLOEREN,

Petitioner,

v.

ROBERT L. DRUSCHEL,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. Introduction

Mr. Cloeren submits this reply brief because Mr. Druschel mischaracterized (1) the contacts upon which Wisconsin's courts relied in finding specific personal jurisdiction, (2) the significance and application of this Court's decision in *Burger King v. Rudzewicz*, 471 U.S. 462 (1985), and (3) the effect on this case of the varying jurisdictional standards currently being used by the various United States Circuit Courts of Appeals. In doing so, Mr. Druschel's arguments concentrated more on the merits of the case than on whether Mr. Cloeren's Petition presents a question this Court should answer. That focus, however, actually confirms the importance of granting this Petition to review and reverse the Wisconsin courts' unconstitutional jurisdictional test.

II. Wisconsin's Courts Did Not Refer To, Or Rely On, Any Contacts Related To The Cause Of Action.

Mr. Druschel invites the Court to ignore Wisconsin's jurisdictional analysis by suggesting the Wisconsin courts identified and relied upon the proper types of contacts in asserting personal jurisdiction over Mr. Cloeren. To this end, he searched the record for bits and pieces of information that might create the impression that the courts considered contacts that were in some way related to the cause of action he asserted against Mr. Cloeren. But for all his effort, he found nothing to support his thesis.

In finding specific personal jurisdiction over Mr. Cloeren, both the Chippewa County Circuit Court and the Wisconsin Court of Appeals relied exclusively on contacts occurring after Cloeren, Inc. (the "Corporation") acquired Production Components. That is to say, the contacts underpinning the courts' analyses did not occur until *after* the transaction took place upon which Mr. Druschel bases his cause of action.

In this case, contacts subsequent to the Corporation's acquisition of Production Components can have no relationship whatsoever to the claimed cause of action. Mr. Druschel brought his complaint because he believes Mr. Cloeren breached his obligation to make a required payment under a promissory note (which supplied partial consideration for the Corporation's purchase of Production Components) (the "Note"). Relevant contacts would be those bearing some relationship to the formation or performance of the Note. But no one – not Mr. Druschel, not the Circuit Court, and not the Court of Appeals – explained how any of Mr. Cloeren's contacts with the State of Wisconsin bear the slightest relationship to the Note. The courts did not even rely on execution of the Note as a jurisdiction-conferring contact (and for good reason – it was executed in Texas (App. 61-68, 108)).

Post-transaction events cannot travel back in time to establish the requisite relationship with the State of Wisconsin. That temporal transposition is impossible unless the court adopts a jurisdictional analysis that conflates the concepts of specific and general personal jurisdiction. In the Wisconsin courts' hands, the "relatedness" requirement expanded so broadly that any contact with the forum state, irrespective of its connection to the cause of action, counted in the minimum contacts equation. The Wisconsin courts adopted a jurisdictional standard that entirely ignores the "relatedness" aspect of specific personal jurisdiction. Removing that key component collapses specific jurisdiction into general jurisdiction. *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 714 (1st Cir. 1996) ("[R]elatedness is the divining rod that separates specific jurisdiction cases from general jurisdiction cases[, and it] . . . ensures that the element of causation remains in the forefront of the due process investigation.").

Perhaps belatedly recognizing the Wisconsin courts' fundamental error in their jurisdictional analyses, Mr. Druschel now attempts to remedy this defect by asserting that the courts relied on pre-acquisition contacts (hoping

thereby to establish at least the possibility that the contacts were related to the Note).[1] However, his one citation to Mr. Cloeren's appendix (App. 5) fails to verify his assertion. None of the contacts listed there refer to any contact between Mr. Cloeren and Wisconsin prior to the Corporation's acquisition of Production Components. Nor do they describe any contact even remotely related to the formation or performance of the Note upon which Mr. Druschel bases his claim.[2]

Giving Mr. Druschel's assertion the broadest possible latitude, it is possible he means to refer to the telephone conversations with Douglas Darrow and Leigh Darrow when he speaks of pre-acquisition contacts. However, nothing in the record supports that reading; indeed, the record contradicts it. The transcript of the hearing in which the circuit court denied the motion to dismiss for

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[1] Brief in Opposition to Petition For Writ of Certiorari at 7 ("Druschel Brief.")

[2] Further acknowledging the defect in the Wisconsin courts' analyses, Mr. Druschel now advances facts upon which he believes the courts could have relied, but did not, in reaching their jurisdictional decisions. For example, Mr. Druschel claims that Mr. Cloeren personally attended the closing of the business purchase in Wisconsin. (Druschel Brief 14.) But the very transcript page to which Mr. Druschel cites for support contradicts his assertion. Mr. Cloeren testified that: "I don't know when they signed their half of the papers. We went up there to collect the stock certificates and tell the employees that the company had been purchased." (App. 108.) That would be a *post*-acquisition visit. Mr. Druschel also refers to the fact that Mr. Cloeren individually obligated himself to payments in excess of $2 million to Druschel. (Druschel Brief 14.) While this is true, it does not constitute a contact with the State of Wisconsin. The Note was executed in Texas, its situs is Orange, Texas, and it provides that it shall be construed and governed under the laws of Texas. (App. 61-68, 108.) Finally, Mr. Druschel turns to the fact that Mr. Cloeren personally pledged the stock he owned in Cloeren, Inc. as collateral. However, Cloeren, Inc. is a Texas corporation, Mr. Cloeren is a Texas resident, and the shares are held by a Texas bank. (App. 48-50, 57-58.) Mr. Druschel does nothing to explain how this counts as a Wisconsin contact.

lack of personal jurisdiction confirms that even these telephone calls were related to the management of Production Components: "The contacts [post acquisition personal visits to Wisconsin] are for management of a business which the corporation he owns bought.... They are substantial contacts to oversee Production Components-Cloeren, Inc. *The phone calls are frequent and for the same purpose.*" (App. 33.) (emphasis supplied). Neither of the Wisconsin courts, however, explained how post-acquisition telephone calls for the purpose of managing Production Components bear any relationship whatsoever to the Note. Nor does Mr. Druschel.

III. The Respondent Misapplies *Burger King v. Rudzewicz.*

The Court likely has little need for us to point out Mr. Druschel's misapprehension of the significance and application of the *Burger King* opinion. *Burger King* did not answer the questions presented by this Petition. But this is not just our opinion – the continuing split amongst the United States Courts of Appeals, bemoaned as recently as 2004, demonstrates that the question still begs an answer. *See, e.g., Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 100 (3rd Cir. 2004) (The "relatedness" question "has plagued federal Courts of Appeals and has resulted in divergent rules."). We will confine ourselves to simply highlighting a few of the errors into which Mr. Druschel fell.

A. *Burger King* Did Not Dispense With The "Relatedness" Inquiry.

Mr. Druschel suggests *Burger King* authorizes courts to consider forum contacts that occur after formation of the contract without regard to whether those contacts relate to the cause of action. From that mistaken assumption, Mr. Druschel argues that this Court need not consider this Petition because *Burger King* essentially eliminated any "relatedness" inquiry. But that is not at all what this Court

said, and nearly every passage quoted by Mr. Druschel refutes his assertion.

For instance, in discussing the "fair warning" the Due Process Clause is supposed to give the average American, he notes that *Burger King* says that obligation "is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, *and* the litigation results from alleged injuries that 'arise out of or relate to' those activities." 471 U.S. at 472-73 (emphasis supplied). (Druschel Brief at 9-10.) Mr. Druschel discusses the "purposefully directed" component of this test, but only as a means of avoiding the "arise out of or relate to" part of the test.

He does this not once, but twice. He again cites *Burger King* for the proposition that "where individuals 'purposefully derive benefit' from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that *arise proximately from such activities*;. . . . " 471 U.S. at 473 (citations omitted, emphasis supplied). (Druschel Brief at 10.) Mr. Druschel never acknowledges that this passage requires a "proximate" relationship between the litigation and the activities.

Finally, nothing about the resolution of the *Burger King* case supports Mr. Druschel's argument that this Court has answered the "relatedness" question presented in this Petition. This Court found specific personal jurisdiction in *Burger King* not simply because of the contract between the parties, but because the dispute between them arose out of the on-going operation of Mr. Rudzewicz's Burger King franchise. In fact, the Court exhaustively detailed the inseparable relationship between the litigation and Mr. Rudzewicz's post-acquisition contacts with Burger King in Florida, all as they related to the operation and failure of the franchise.[3] Because the dispute was

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[3] This Court extensively described those contacts:

> The Court of Appeals concluded, however, that in light of the supervision emanating from Burger King's district office

(Continued on following page)

indisputably and inextricably tied up in the interaction between Mr. Rudzewicz and a Florida corporation *after the purchase of the franchise*, it was appropriate to base jurisdiction on those post-acquisition contacts. Here, however, the Wisconsin courts (and Mr. Druschel) reject the need to demonstrate how post-acquisition contacts relate in any way to the asserted cause of action.

Burger King did not dispense with the "relatedness" inquiry. Mr. Druschel simply glossed over the portions of the opinion that explicitly call for its application.

> in Birmingham, Rudzewicz reasonably believed that "the Michigan office was for all intents and purposes the embodiment of Burger King" and that he therefore had no "reason to anticipate a Burger King suit outside of Michigan." This reasoning overlooks substantial record evidence indicating that Rudzewicz most certainly knew that he was affiliating himself with an enterprise based primarily in Florida. The contract documents themselves emphasize that Burger King's operations are conducted and supervised from the Miami headquarters, that all relevant notices and payments must be sent there, and that the agreements were made in and enforced from Miami. Moreover, the parties' actual course of dealing repeatedly confirmed that decision-making authority was vested in the Miami headquarters and that the district office served largely as an intermediate link between the headquarters and the franchisees. When problems arose over building design, site-development fees, rent computation, and the defaulted payments, Rudzewicz and MacShara learned that the Michigan office was powerless to resolve their disputes and could only channel their communications to Miami. Throughout these disputes, the Miami headquarters and the Michigan franchisees carried on a continuous course of direct communications by mail and by telephone, and it was the Miami headquarters that made the key negotiating decisions out of which the instant litigation arose.

Burger King, 471 U.S. at 480-81 (citations omitted).

B. *Burger King* Held That A Single Contract Is Insufficient To Confer Jurisdiction On A Nonresident Defendant.

Mr. Druschel makes much of the fact that a promissory note between a Texas resident and a Wisconsin resident is at the "heart of this litigation." (Druschel Brief 12.) It appears Mr. Druschel means to argue that a contract alone, in and of itself, is sufficient to confer personal jurisdiction over a non-resident. However, the *Burger King* case rejected the theory that an "individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum." *Burger King*, 471 U.S. at 478 (emphasis in original). Thus, to hale a nonresident defendant into another jurisdiction, there must be contacts with the forum in addition to the contract itself.

Burger King actually weakens Mr. Druschel's claim that this Court has provided adequate direction to the average American on where he or she may be subject to suit. This Court recognizes that a contract provision identifying which State's law shall be applied in the event of a conflict contributes to the reasonable expectation of where one may be subject to jurisdiction. *Burger King*, 471 U.S. at 482. The Note, and the promissory note it replaced, both state that they "shall be construed under and governed by the laws of the State of Texas." (App. 64, 70-71.) Thus, the *Burger King* case reinforces Mr. Cloeren's reasonable belief that if he were to be sued, it would have been in Texas, not Wisconsin. *Burger King* simply does not support Mr. Druschel's argument that this Court need not take up this Petition.

* * * *

Burger King did not answer the question this Court posed in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984). But this Petition now presents the opportunity to do so. Twenty years after recognizing the question we ask the Court to resolve, the Courts of

Appeals have remained unable to harmonize their outcome-determinative jurisdictional tests. It is time for this Court to bring uniformity to this aspect of the Due Process Clause and answer the question that has been "plaguing" the United States Courts of Appeals.

IV. The Tests Applied By The Circuit Courts Of Appeals Are Outcome Determinative.

Finally, Mr. Druschel argues that granting this Petition is not necessary because under any of the "relatedness" tests, Mr. Cloeren would be subject to personal jurisdiction in Wisconsin. (Druschel Brief 14.) But that is certainly not true. Below we foreshadow the arguments we will direct to the merits of this case (should the Court grant the Petition) for the purpose of demonstrating that answering the question we present can change the outcome of this case.

The conflated jurisdictional test employed by the Wisconsin courts (in which all forum contacts get lumped together, regardless of their relationship to the cause of action) obviously resulted in an affirmative jurisdictional finding. On the other hand, application of the variety of "relatedness" tests used by the United States Courts of Appeals would yield results ranging from "definitely no jurisdiction" all the way to "plausible jurisdiction."

For example, had the Wisconsin courts adopted the "proximate cause" test, they would not have exercised jurisdiction. This test asks whether the forum contacts would be relevant to proving the cause of action. Here, they are not. Mr. Cloeren's post-acquisition management of Production Components makes no fact related to the formation or performance of the Note more or less likely to be true. Because the Wisconsin courts considered only post-acquisition contacts, the case flunks the First Circuit's "proximate cause" test. *See Nowak*, 94 F.3d 708.

On the other hand, had the Wisconsin courts employed the Ninth Circuit's "but-for" test extraordinarily loosely, it is possible (barely) they could find jurisdiction. *See, e.g., Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). In a Rube Goldberg sense, Mr. Cloeren's post-acquisition management of Production Components could relate to the Note. It is true that there would have been no management activity had the Corporation not purchased Production Components, and without that purchase, Mr. Cloeren would not have signed the Note.

Even so, however, the causation arrows between (a) management of Production Components, and (b) the Note, run the wrong direction. That is to say, if the parties had a dispute over Mr. Cloeren's management of Production Components, the Corporation's purchase of the company would be a causative factor in the dispute (i.e., no management activity but for the prior purchase), and therefore Mr. Cloeren's execution of the Note (had it been a Wisconsin contact) would have been a valid contact under this test. But the opposite is not true.

It cannot be said that there would be no Note but for Mr. Cloeren's post-acquisition management activities. Simply stating the proposition this straightforwardly demonstrates its fallacy. In traditional physics, causes precede effects. The same is true in a "but-for" test. It is not possible for events occurring after execution of the Note to have played a part in causing its execution. And neither Mr. Druschel nor the Wisconsin courts have asserted that Mr. Cloeren's post-acquisition contacts caused (even in an attenuated manner) the problem with performance of the Note. Thus, a proper "but-for" analysis would not consider the contacts upon which the Wisconsin courts relied.

The Court's resolution of the question we present in the Petition can, and should, change the outcome of this case. In the larger context, the Court needs to answer the

question it recognized in *Helicopteros* because, depending upon the Circuit in which a defendant finds himself, he will receive more or less Due Process protection. The Court should grant this Petition and return foreseeability and uniformity to the operation of the Due Process Clause.

V. Conclusion.

For all the reasons stated above, Mr. Cloeren respectfully asks this Court to grant his Petition.

Respectfully submitted,

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